SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
APPELLANTS,

vs.

MARGARET WISSNER

APPEAL FROM THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA

FILED JUNE 14, 1949.

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF STANISLAUS

(File endorsement omitted)

No. 33,856

MARGARET V. WISSNER, Plaintiff,

vs.

LOUISE M. WISSNER AND LEANDOUS H. WISSNER, Defendants

FIRST AMENDED COMPLAINT—Filed March 15, 1947

Comes now the plaintiff and as and for a first cause of action against the defendants and each thereof, alleges as follows, to wit:

I

That at all times mentioned herein the plaintiff, Margaret V. Wissner, and Leonard O. Wissner, were bona fide residents of the State of California, and that the plaintiff, Margaret V. Wissner, and Leonard O. Wissner intermarried at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and up to the death of the said Leonard O. Wissner, were husband and wife; that the said Leonard O. Wissner was not possessed of any property whatever at the time of his said marriage to plaintiff.

II

That the said Leonard O. Wissner died testate in Kalai Kunda, India, on the 14th day of November, 1945, and left Margaret V. Wissner, the plaintiff herein, as his surviving widow; that all of the property possessed by said Leonard O. Wissner at the time of his death was community property and that subsequent to the marriage of said Leonard O. Wissner and the plaintiff herein, as hereinabove alleged, [fol.2] the said Leonard O. Wissner acquired no property whatsoever by gift, devise, or bequest and that all property in the possession or control of said Leonard O.

Wissner at all times subsequent to his marriage with the plaintiff herein was acquired by the joint efforts of the plaintiff and the said Leonard O. Wissner and while they were husband and wife and that all of said property was acquired by them in said manner while they were residents of the State of California.

III

That prior to the date of death of Leonard O. Wissner as hereinabove alleged, he did, without the consent or knowledge or acquiescence of the plaintiff, Margaret V. Wissner, and without her joining in said transactions and against her will and consent, assign, transfer, deliver, and make gifts of property of the community to the defendants herein and to each of said defendants, said gifts consisting of money in an amount somewhere between $3,000.00 and $4,000.00, a Mercury automobile of the value of approximately $1600.00, and stocks, bonds, and other articles of value, the exact description, character, and value of which are unknown to this plaintiff; that the defendants are fully advised of and have complete knowledge of the properties of the community received by them from the said Leonard O. Wissner but that said defendants and each thereof, in spite of repeated demands on them for delivery to plaintiff of her rightful interest in said properties of the community and for a statement and account thereof, have refused and neglected and still refuse and neglect to give to plaintiff and statement of account of said properties and refuse and and neglect to deliver to plaintiff her rightful interest in said properties of the community; that the assignment, transfer and delivery of said properties of the community to the defendants herein, as hereinabove alleged, was solely and wholly without consideration and that as a result [fol. 3] thereof this plaintiff has been defrauded and deprived of her community interest in said moneys, automobile, stocks, bonds, and other assets transferred, delivered, and given to the defendants and each thereof, as hereinabove alleged.

IV

That, as hereinabove set forth, said defendants and each thereof fail, neglect, and refuse to make an accounting of said property and said defendants claim and each thereof claims to be the owner of and entitled to said moneys, said

automobile, and said other assets and property of the community but that said defendants do not have and neither of said defendants has any right, title, or interest in or to said property.

As and for a second and separate cause of action herein, plaintiff alleges as follows, to wit:

I

Plaintiff hereby specifically refers to, incorporates herein, and makes a part of this, her second cause of action paragraphs I and II of plaintiff's first cause of action.

II

That the deceased, Leonard O. Wissner, was at the time of his death serving in the army of the United States of America, under the rank of Major, and that said deceased had served in the army of the United States of America for several years prior to his death; that during the time of his service in the said United States Army he, the said deceased Leonard O. Wissner, subscribed for and there was issued to him a National Service Life Insurance Policy in the principal sum of $10,000.00 and that plaintiff is informed and believes and therefore alleges that the numbe: of said policy is 14 N 865 6931; that thereafter, on the 14th day of November, 1945, the said Leonard O. Wissner, being at that time the husband of plaintiff herein, died in Kalai Kunda, India, as hereinabove alleged, and that at said time said [fol. 4] insurance policy hereinabove referred to was in full force and affect; that the premiums on said insurance policy above referred to and the whole thereof were paid from the earnings of the said Leonard O. Wissner, he being at the time of the issuance thereof and at all times thereafter, the husband of this plaintiff, and his said earnings being the community property of plaintiff and himself.

III

That the beneficiaries named in said policy of insurance above referred to were the defendants herein, the defendant Louise M. Wissner being named as the principal beneficiary under said policy and the defendant Leandous H. Wissner being named as the contingent beneficiary under said policy; that the plaintiff herein never at any time had knowledge

that the said Leonard O. Wissner had named anyone other than herself as beneficiary under said policy and that said plaintiff did not at any time consent to the naming of anyone other than herself as beneficiary under said insurance policy and that said plaintiff did not at any time consent to the application or use of community funds to the payment of premiums on a policy of insurance wherein the defendants or either thereof were named as beneficiaries.

IV

That said defendants and each thereof have received as proceeds of said policy the sum of $76.70 per month, commencing as of November 14, 1945, and that said defendants and each thereof has received for the use and benefit of the belief of plaintiff herein, have received as proceeds of said insurance policy the total sum of $1764.10 up to and including the month of September, 1947; that as a result of and because of the payment of premiums on said policy with community funds, as aforesaid, the plaintiff is now and at all times herein mentioned has been, entitled to one-half of the proceeds of said policy and the said defendants have and each thereof has recived for the use and benefit of the [fol. 5] plaintiff herein from the proceeds of said policy the total sum of $882.05, with interest on the monthly installments received under said policy as herein alleged at the rate of 7% per annum from the date when said payments were received by the said defendants and each thereof; that although plaintiff has often demanded of defendants that they pay and deliver to her the amounts due her from the proceeds of said insurance policy as hereinabove alleged, said defendants and each thereof have neglected and refused and still neglect and refuse to pay said sums or any part thereof to plaintiff and that the entire amount of $882.05, together with interest thereon at the rate of 7% per annum from the date of the receipt of each installment, is now due, owing, and unpaid from the defendants and each thereof to plaintiff.

As and for a third and separate cause of action herein plaintiff alleges as follows, to wit:

I

Plaintiff hereby specifically refers to, incorporates herein and makes a part of this, her third cause of action, Paragraph I of plaintiff's first cause of action.

II

That the said Leonard O. Wissner entered the army of the United States of America as a captain on or about the 9th day of November, 1942, and was later promoted to the grade of major and continued in the army of the United States of America in said grade of major until the 14th day of November, 1945, on which date he died in Kalai Kunda, India, and left Margaret V. Wissner, the plaintiff herein, as his surviving widow; that during all of the years of service of said Leonard O. Wissner in the army of the United States, namely, from November 9, 1942 to November 14, 1945, he received from the United States of America a specified payment each month for the support, maintenance, and care of his wife, Margaret V. Wissner, the plaintiff herein; that said payment was never less than $90.00 per month and [fol. 6] that, according to the information and belief of the plaintiff herein, said payment exceeded said sum of $90.00 per month after the said Leonard O. Wissner attained the grade of major; that said moneys were paid to the said Leonard O. Wissner each month by the United States government for the use and benefit of this plaintiff and for her support and maintenance and for no other purpose, but that said Leonard O. Wissner failed and neglected to pay said moneys or any part thereof, save and except the sum of $540.00, to this plaintiff but that on the contrary, the said Leonard O. Wissner, after the first six months of his service in the United States army, paid and delivered to the defendants herein all of said moneys that were received by him from the United States government for the use and benefit of the plaintiff herein and that said defendants now have in their possession a sum of money in excess of $3000.00 which was paid to them by the said Leonard O. Wissner out of moneys received by him from the United States government for the use and benefit of this plaintiff, as hereinabove alleged, and that said defendants now hold

in their possession said sum of money in excess of $3000.00, the exact amount being unknown to this plaintiff but well known to the defendants, which was received by said defendants for the use and benefit of this plaintiff and which said money belongs to and is the property of this plaintiff.

III

That although plaintiff has often demanded of defendants that they pay said moneys hereinabove referred to to plaintiff, the said defendants and each thereof have refused and neglected and still refuse and neglect to pay the same or any part thereof to the plaintiff herein and refuse to make any accounting of said moneys to this plaintiff.

WHEREFORE, plaintiff prays judgment against said defendants and each thereof as follows, to wit:

[fol. 7] 1. That said defendants and each thereof be required to make a full and complete accounting of all moneys, personal property, bonds, stocks, or other assets received from the said Leonard O. Wissner and a complete accounting of all moneys or property received in exchange for any of said assets.

2. That the court adjudge and determine the amount of moneys, stocks, bonds, or other assets or property received by the defendants or either thereof from the said Leonard O. Wissner belonging to this plaintiff and enter judgment against the defendants and each thereof for the sum of money — which plaintiff is entitled and further declare the defendants are holding the portion of said moneys, stocks, bonds, or other assets or property belonging to plaintiff in trust for plaintiff and require them to deliver the same up to this plaintiff.

3. That judgment be entered against said defendants and each thereof in favor of plaintiff for the sum of $882.05 on account of the proceeds of the insurance policy referred to herein received by them and belonging to plaintiff, together with interest thereon and on the respective installments thereof from the date when the same were received until paid, at the rate of 7%.

4. That the defendants and each thereof be ordered and required to pay and deliver to plaintiff herein one-half of all moneys hereafter received from the proceeds of the said

insurance policy immediately upon the receipt thereof by the said defendants or either thereof.

5. For such other and further relief as to the court may seem just and equitable in the premises and for plaintiff's costs of suit herein incurred.

Dated this 13th day of March, 1947.

Cleary and Zeff, By Leslie A. Cleary, Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by Margaret V. Wissner. Jurat omitted in printing.*

[fol. 9] IN SUPERIOR COURT OF STANISLAUS COUNTY

ANSWER TO FIRST AMENDED COMPLAINT—Filed April 21, 1947

Come now the defendants above named and answer the first cause of action as set forth in plaintiff's first amended complaint on file herein as follows, to wit:

I

In answer to paragraph I of said first cause of action, said defendants aver that the said Leonard O. Wissner was possessed of a Ford automobile of the estimated value of $450.00 at the time of his marriage to plaintiff. Otherwise said defendants admit the allegations of paragraph I of said first cause of action.

II

Answering paragraph II of said first cause of action, said defendants aver that certain of the property possessed by Leonard O. Wissner at the time of death was joint property of himself and plaintiff held in joint tenancy and was not therefore community property. Except for the foregoing, defendants admit the allegations of paragraph II of said first cause of action.

III

Save and except as hereinafter stated, defendants deny each and every, all and singular, the allegations, matters and things alleged and set forth in paragraph III of said first cause of action. In this respect said defendants aver that prior to his death the said Leonard O. Wissner did pay

and deliver to defendants approximately $3,000 in cash and a Mercury automobile, which defendants subsequently sold for the sum of $1,080; that said money and automobile were paid and delivered to the defendants in repayment of money advanced to said Leonard O. Wissner and help and assistance given to him during the time that he was acquir- [fol. 10] ing his medical education and for other moneys advanced to him and assistance given him during his early life; that said decedent was a dutiful son and acknowledged his obligation to the defendants herein, his parents, and paid and delivered said money and automobile to the defendants in payment of and on account of said obligation.

IV

Deny generally and specifically, each and every, all and singular, the allegations, matters and things alleged and set forth in paragraph IV of said first cause of action, except that said defendants acknowledge that they have made no formal accounting to the plaintiff, and in this respect said defendants aver that they did not and do not consider themselves morally or legally obligated to make any formal accounting to the plaintiff.

Said defendants answer the second cause of action as set forth in plaintiff's first amended complaint as follows: to wit:

I

Said defendants hereby adopt and incorporate herein and make a part hereof their answers to paragraphs I and II of plaintiff's first cause of action as their answer to paragraph I of plaintiff's second cause of action.

II

Subject to the qualifications hereinafter stated, said defendants admit the allegations of paragraph II of said second cause of action. In this respect, said defendants aver that the premiums on the policy of life insurance therein mentioned were paid by deduction from the pay of the said Leonard H. Wissner as an officer in the U. S. Army; that at the time said policy was issued and obtained defendants herein were designated as beneficiaries therein and at all times remained so designated; that defendants are informed and believe and therefore allege the fact to be that

[fol. 11] a soldier in the Army of the United States of America has the legal right to designate the beneficiary in any National Service Life Insurance policy issued on his life, and that the designation of the defendants herein as beneficiaries in said policy is final and conclusive as against any claimed rights of the plaintiff.

III

Admit that the beneficiaries named in said policy of insurance above referred to were the defendants herein, the defendant Louise M. Wissner being named as the principal beneficiary under said policy, and the defendant Leandous H. Wissner being named as the contingent beneficiary under said policy. Except for the foregoing, said defendants aver that they have no knowledge, information or belief sufficient to enable them to answer the allegations of said paragraph III or any part thereof, and basing their denials upon such want of knowledge, information or belief they deny said allegations and each and all thereof.

IV

The defendant Louise M. Wissner admits that she has received, as proceeds of said policy, the sum of $76.70 per month commencing as of November 14, 1945, and that she has received, as proceeds of said insurance policy, the total sum of $1227.20 up to and including the month of February, 1947. Except for the foregoing, said defendants and each of them deny each and every, all and singlar, conjunctively and disjunctively, the allegations, matters and things alleged and set forth in paragraph IV of said second cause of action.

Said defendants answer the THIRD CAUSE OF ACTION as set forth in plaintiff's first amended complaint as follows, to wit:

I

Said defendants hereby refer to their answer to paragraph I of the first cause of action and incorporate, adopt and replead the same herein as their answer to the first [fol. 12] paragraph of said third cause of action.

II

Admit that said decedent Leonard O. Wissner left Margaret V. Wissner, the plaintiff here, as his surviving

widow. Admit that Leonard O. Wissner died on the 14th day of November, 1945, at Kalai Kunda, India. Except for the foregoing, the defendants aver that they have no knowledge, information or belief sufficient to enable them to answer the allegations of paragraph II of said third cause of action or any thereof, and basing their denials upon such want to knowledge, information or belief they deny said allegations and each and all thereof. Deny that any money received by these defendants was money received by the said Leonard O. Wissner, deceased, for the use and/or benefit of the plaintiff herein. Deny that any moneys received by the defendants were received by them for the use and/or benefit of the plaintiff. Deny that said moneys or any moneys received by the defendants from the said Leonard O. Wissner are the property of the plaintiff.

III

Admit that defendants have refused to pay any money to plaintiff, and in this respect said defendants aver that they are not indebted to plaintiff in any way, shape or form, and do not have in their possession any money or property belonging to plaintiff.

Wherefore, said defendants pray that plaintiff take nothing by her amended complaint on file herein and that they have and recover their costs of suit incurred herein.

Vernon F. Gant, Attorney for said Defendants.

[fol. 13] *Duly sworn to by Leandous H. Wissner. Jurat omitted in printing.*

[fol. 14] [File endorsement omitted]

In Superior Court of Stanislaus County

Findings of Fact and Conclusions of Law—Filed January 2, 1948

The above entitled cause came on regularly for trial on the 3rd day of October, 1947, before the court, Honorable B. C. Hawkins judge thereof, sitting without a jury, a jury trial having been duly waived by all parties; Leslie A. Cleary, Esquire, of the firm of Cleary and Zeff, appeared on behalf of the plaintiff, and Carlos J. Badger, Esquire,

associated with Vernon F. Gant, Esquire, appeared on behalf of the defendants;

Relevant and competent evidence, both oral and documentary, was offered and received on behalf of the parties to the action and the matter having been submitted for decision, the Court from the evidence so introduced and received now finds the facts as follows, to wit:

1. That the plaintiff, Margaret V. Wissner, and Leonard O. Wissner intermarried at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and up to the death of said Leonard O. Wissner were husband and wife; that at all times subsequent to said marriage and at all times mentioned in plaintiff's complaint, the said Margaret V. Wissner and Leonard O. Wissner were residents of and domiciled in the state of California; that Leonard O. Wissner was not possessed of any property at the time of his marriage to plaintiff except a Ford automobile of the value of approximately $450.00 and his clothing and personal effects, and that at that time his indebtedness was in excess of $750.00; that plaintiff at the time of the marriage had approximately $300.00 in cash.

2. That the said Leonard O. Wissner died testate in Kalai Kunda, India, on the 14th day of November, 1945, and [fol. 15] left Margaret V. Wissner, the plaintiff herein, as his surviving widow; that all of the property possessed by the said Leonard O. Wissner at the time of his death was community property of himself and the plaintiff in this action and that all property owned or possessed by the said Leonard O. Wissner subsequent to his marriage with the plaintiff herein was acquired by the joint efforts of the plaintiff and the said Leonard O. Wissner and while they were husband and wife and that all of the said property was acquired by them in said manner while they were both residents of and both domiciled in the State of California and was community property.

3. That prior to the date of death of Leonard O. Wissner he did, without the consent or knowledge or the acquiescence of the plaintiff, Margaret V. Wissner, and without her joining in said transactions and against her will and consent and without consideration, assign, transfer, deliver, and make gifts of the property of the community to the defendants herein, of the total value of $4600.00, namely, $3000.00

in money and a Mercury automobile of the value of $1600.00; that the plaintiff, Margaret V. Wissner, prior to the institution of this action, demanded of the defendants and each thereof that they account for and pay over to her her community interest in said moneys and in said automobile, being ½ thereof, or a total of $2300.00, but that said defendants and each thereof refused to account for or deliver to or pay over to the plaintiff, Margaret V. Wissner, her community interest in said money and in said automobile or any part thereof; that the transfer of said community property of the plaintiff and Leonard O. Wissner by the said Leonard O. Wissner to the defendants herein, namely, said sum of $3000.00 and said automobile of the value of $1600.00, was wholly without consideration and that as a result thereof the plaintiff was deprived and defrauded of her community interest in said moneys and in said automobile;

That on or about the 23rd day of September, 1943, Leon- [fol. 16] ard O. Wissner delivered the Mercury automobile which was the community property of the plaintiff and the said Leonard O. Wissner to the defendants and endorsed the title papers to them and with his knowledge and consent they used said car from said time and had said car licensed in their names. That the plaintiff knew that said car was being used by said defendants and the brother of the said Leonard O. Wissner and did not object to said use until after the death of the said Leonard O. Wissner and the sale of said automobile. That at the time demand was made on said defendants for said moneys and said automobile, said moneys, except $500.00, had been removed from said joint bank account of the said Leonard O. Wissner, and the defendants, Louise M. Wissner and Leandous H. Wissner, and said automobile had been sold for the sum of $1,080.00. That said sum of $1,080.00 was the reasonable value of said automobile at the time the same was sold.

4. That the plaintiff is the owner of and entitled to ½ of the value of said community property so transferred and delivered by the said Leonard O. Wissner to the defendants and each thereof and is entitled to receive the value thereof back from said defendants and each thereof.

5. That the deceased, Leonard O. Wissner, was at the time of his death serving the army of the United States of America with the rank of Major and that said deceased had served in the army of the United States of America for

several years prior to his death; that at the time of the death of said Leonard O. Wissner he was the holder of a National Service Life Insurance policy in the principal sum of $10,000.00 which said policy matured and was payable upon his death on November 14, 1945; that the said Leonard O. Wissner at the time of the issuance of said policy of insurance to him and during all of the time thereafter up to his death was the husband of this plaintiff and that both he and this plaintiff were at the time of the issuance of said insur- [fol. 17] ance policy and at all times thereafter legal residents of and domiciled in the State of California; that the premiums on said insurance policy and the whole thereof were paid from the earnings of the said Leonard O. Wissner and that the said earnings of the said Leonard O. Wissner from which the premiums on said insurance policy were paid were the community property of the plaintiff and the said Leonard O. Wissner and that all of the premiums paid on said policy of insurance were paid with the community property of the plaintiff and her said husband, Leonard O. Wissner;

6. That the beneficiaries named in said policy of Insurance on the life of the said Leonard O. Wissner were the defendant, Louise M. Wissner, who was named as the principal or primary beneficiary, and the defendant, Leondous H. Wissner, who was named as the contingent beneficiary; that the plaintiff never at any time prior to the death of Leonard O. Wissner had any knowledge that the said Leonard O. Wissner had named anyone other than herself as beneficiary under said policy and that the plaintiff did not at any time consent to the naming of anyone other than herself as beneficiary under said policy and that said plaintiff did not at any time consent to the application or use of community funds to or for the payment of premiums on said insurance policy or on any policy of insurance wherein the defendants or either thereof were named as beneficiaries and that the naming of said defendants and each thereof as beneficiaries under said policy was without consideration;

7. That the proceeds of said insurance policy were and are the community property of plaintiff and Leonard O. Wissner and that plaintiff is entitled to ½ of the entire proceeds of said insurance policy when and as the same are paid to the defendants or either thereof, and is entitled to recover ½

of the proceeds thereof from the defendants and each thereof when and as the same are received by said defendants or either thereof.

[fol. 18] 8. That said defendants and each thereof have received as proceeds of said policy the sum of $76.70 per month commencing as of November 14, 1945, and that the total amount received by said defendants and each thereof up to the time of the trial of this action was and is the sum of $1764.10, including the payment of $76.70 received by said defendants under said policy in the month of September, 1947;

That plaintiff at all times herein mentioned has been entitled to receive from the defendants and each thereof ½ of the proceeds of said policy of insurance and is entitled to receive from said defendants and each thereof ½ of the total amount collected by said defendants, or the sum of $882.05, with interest on the monthly installments received by said defendants and each thereof under said insurance policy from the time when the same were received at the rate of 7% per annum and up to the date of the entry of judgment herein; that plaintiff is further entitled to receive from defendants and each thereof ½ of any and all proceeds of said insurance policy received by them in the future under said insurance policy and is entitled to receive from said defendants ½ of each monthly installment of proceeds immediately upon the receipt thereof by said defendants of either thereof;

That in the event of the failure of the defendants to pay over to plaintiff ½ of said proceeds within five (5) days after the receipt thereof by them, plaintiff is entitled to recover interest thereon at the rate of 7% per annum until paid.

9. That the defendants herein did not receive from Leonard O. Wissner any moneys paid to him by the United States Government for the use and benefit of plaintiff herein as alleged in plaintiff's third cause of action.

As conclusions of law from the foregoing findings of fact, the Court finds that the plaintiff is entitled to judgment against the defendants and each thereof as follows:

[fol. 19] 1. For the sum of $2300.00, together with interest thereon at the rate of 7% per annum from November 14, 1945, to date of judgment herein.

2. For the further sum of $882.05 with interest at 7% per annum on each accruing installment of insurance from the date when the same was paid to the defendant, Louise M. Wissner, up to the date of Judgment, said installments belonging to the plaintiff, being in the sum of $38.35 per month commencing with November 14, 1945.

3. That plaintiff is entitled to receive from the defendants ½ of any and all proceeds of the said National Service Life Insurance policy on the life of Leonard O. Wissner, deceased, at the time the same are received by the defendants or either thereof, and that said defendants and each thereof shall pay over ½ of said proceeds immediately upon the receipt thereof to this plaintiff and that failing to do so within five days after receipt thereof, said defendants and each thereof shall pay plaintiff interest thereon at the rate of 7% per annum until the same are paid.

4. That plaintiff recover her costs of suit herein incurred from the defendants and each thereof.

Dated this 2nd day of January, 1948.

B. C. Hawkins, Judge of the Superior Court.

[fol. 20] [File endorsement omitted]

In Superior Court of Stanislaus County

Judgment—Filed January 8, 1948

This cause came on regularly for trial before the court sitting without a jury on the 3rd day of October, 1947, Leslie A. Cleary, Esquire, of the firm of Cleary and Zeff, appearing as attorney for the plaintiff, and Carlos J. Badger, Esquire, associated with Vernon F. Gant, Esquire, appearing as attorney for the defendants;

The Court heard the testimony and received evidence, both oral and documentary, on behalf of the respective parties and having examined the proofs and being fully advised in the premises, the Court filed herein its findings of fact and conclusions of law and directed that judgment be

entered in accordance therewith; Now, therefore, by reason of the law and the findings aforesaid:

It is hereby ordered, adjudged, and decreed as follows, to wit:

1. That plaintiff have and recover judgment against the defendants and each thereof for the sum of $2300.00, together with interest thereon at the rate of 7% per annum from November 14, 1945, up to the date of judgment herein.

2. That plaintiff have and recover judgment against the defendants and each thereof for the sum of $882.05, together with interest in the sum of $72.68, being the interest on the plaintiff's ½ of each accruing installment of insurance at 7% per annum from the date when the same was paid to the defendant, Louise M. Wissner, up to the date of judgment herein, commencing with the installment paid on November 14, 1945, and including the payment made in the month of September, 1947.

[fol. 21] 3. That plaintiff have and recover from the defendants and each thereof ½ of any and all proceeds of the National Service Life Insurance policy on the life of Leonard O. Wissner, deceased, at the time the same are received by the defendants or either thereof and said defendants and each thereof are hereby ordered to pay over to the plaintiff ½ of any and all proceeds of said National Service Life Insurance policy on the life of said Leonard O. Wissner, deceased, immediately upon the receipt thereof by said defendants or either thereof, commencing with the installment received by said defendants in the month of October, 1947; should said defendants or either thereof fail to pay ½ of said proceeds to plaintiff within five (5) days after the receipt thereof, the plaintiff shall recover interest thereon at the rate of 7% per annum until the same are paid.

4. That plaintiff have and recover her costs of suit herein from said defendants and each thereof, which said costs are hereby taxed in the sum of $——.

Dated this 2nd day of January, 1948.

B. C. Hawkins, Judge of the Superior Court.

[fol. 22] [File endorsement omitted]

IN SUPERIOR COURT OF STANISLAUS COUNTY

NOTICE OF APPEAL—Filed January 19, 1948

To the Clerk of the Above Entitled Court:

You will please take notice that the defendants hereby appeal to the District Court of Appeal of the State of California, Third Appellate District, from the judgment therein entered in the said Superior Court on the 8th day of January, 1948, in favor of the plaintiff in said action, and against said defendants; and from the whole thereof.

Dated this 19th day of January, 1948.

Vernon F. Gant and Carlos J. Badger, Attorneys for Defendants.

Receipt of copy of the within and foregoing Notice of Appeal admitted this 19 day of January, 1948.

Cleary & Zeff, Attorneys for Plaintiff.

[fol. 23] IN DISTRICT COURT OF APPEAL OF CALIFORNIA

[Civ. No. 7528. Third Dist. Jan. 21, 1949.]

MARGARET V. WISSNER, Respondent,

v.

LOUISE M. WISSNER et al., Appellants

[fol. 24] Appeal from a judgment of the Superior Court of Stanislaus County. B. C. Hawkins, Judge. Affirmed.

Action to recover community property transferred by husband to defendants without wife's knowledge or consent, and to recover proceeds of a life insurance policy. Judgment for plaintiff affirmed.

Vernon F. Gant and Carlos J. Badger for Appellants.

Cleary & Zeff for Respondent.

OPINION

ADAMS, P. J.:

Plaintiff, respondent before this court, brought this action against Louise and Leandous Wissner, the parents of plaintiff's deceased husband, Leonard O. Wissner. The

complaint alleged that plaintiff and said decedent were married in California in 1930; that at the time of said marriage decedent had no property and that all property which he thereafter acquired was community property acquired by the joint efforts of the spouses; that Leonard died testate on November 14, 1945, leaving plaintiff as his surviving widow; that during the marriage the husband Leonard made transfers of community property to defendants, consisting of moneys, stocks, bonds and an automobile, without plaintiff's knowledge or consent and without consideration, and as a result plaintiff was defrauded of her community interest in such transferred assets; and that defendants refused to account to plaintiff for such assets and claimed to be the owners thereof, though they were without right, title or interest therein or thereto.

In a second count plaintiff alleged that decedent had served in the Army for several years prior to his death, and had taken out a national service life insurance policy in the sum of $10,000; that he had paid the premiums [fol. 25] thereon from his salary, which was community property, but had, without plaintiff's knowledge or consent, made his mother principal beneficiary and his father contingent beneficiary thereof; and that since the death of plaintiff's said huband defendants had received from the proceeds of said policy $882.05, but refused on demand to pay to plaintiff any portion thereof.

A third cause of action was stated, but it is not involved in this appeal.

As an answer to plaintiff's first cause of action defendants set up that moneys which decedent had paid over to them had been paid to them to satify a debt of decedent to them for aid and assistance which they had given him during his attendance at medical school. As for the second cause of action, they conceded that premiums on the life insurance policy had been paid with community funds, but alleged that the proceeds of such policy were payable to them alone by virtue of the federal statutes governing the issuance of such policies, and that such statutes alone controlled, and prohibited plaintiff from claiming any interest therein.

After trial of the issues findings were made in favor of plaintiff on the first and second causes of action; and from the judgment which followed defendants have appealed,

raising two issues, the first, whether the evidence supports the finding that the transfers to defendants were without consideration; and, second, whether the community property law of California gives plaintiff a right to any part of the proceeds of the life insurance policy.

[1] We are satisfied that there is sufficient evidence to support the conclusion of the trial court on the first count. Defendants admitted that during his service in the Army, decedent, who was first a captain and then a major, had paid to them approximately $3,000 in cash, and that he transferred to them an automobile which had been purchased in 1938. The moneys turned over were deposited in a joint bank account in the names of defendants and decedent, upon which both decedent and defendant Louise Wissner drew checks. After Leonard's death the defendants withdrew the balance remaining in the account. The automobile pink slip was received by defendants from their son in the fall of 1943, and they sold the automobile after his death for $1,080.

In a letter written by Leonard from India on October 22, 1944, beginning "Dear Folks All," which letter was delivered to the Bank of America, Modesto, by defendants, he stated that he had already sent a check for $30 and was enclosing another for $90.91. He then added: "I want a [fol. 26] bank account, probably commercial, to be held jointly by you folks and by me. I want the allotments to be deposited in it. I want a reserve of $250 to $500 to be allowed to accumulate and the bonds to be purchased as I previously instructed them, and turned over to you for safekeeping. I want a routine accounting sent to you and referred to me as you think best or necessary. I would like to have a check book sent me in case of need. Please make this all very clear to the bank. Present this letter if necessary." The evidence shows that the joint account between the defendants and their son was opened November 10, 1944, with an initial deposit of $337.50. Thereafter 12 deposits of like amounts were made through allotments by decedent directly to the bank, and there were others. Decedent from time to time drew upon the account and once his mother drew $500 and sent it to him. After Leonard's death she withdrew the balance and deposited it in defendants' own account with the American Trust Company. The Bank of America account was then closed.

Mrs. Wissner testified that $2,906.27 and the money for the automobile was all defendants received. She stated that prior to the time this account was opened the bank had been buying bonds for decedent out of funds sent it by Leonard, which bonds were in the names of decedent and one Naomi Beiler; that the bank had mailed the bonds to defendants who had put them in a safe deposit box, and, after Leonard's death, had turned them over to the attorney for his estate.

Plaintiff testified that she and Leonard were married in 1930, before the latter had completed his medical training. She was a nurse, and continued to practice her profession, her earnings being put into a joint account with her husband, which account continued until November, 1944, at which time Leonard withdrew all of the balance. Regarding the automobile turned over to defendants, she stated that she finished payments thereon after her husband went into the service. For six months after he went into the service plaintiff received an allotment of $90 per month, then it was discontinued.

Lloyd Wissner, brother of Leonard, testified regarding letters which he received from Leonard. One, dated September 26, 1943, requested Lloyd to get the doctor's instruments and equipment moved "before M. receives the notice that I have stopped her allotment." In another dated January 7, 1943, he stated that he wished his attorney could get an insurance policy away from plaintiff. In one dated September 14, 1943, Leonard mentioned "Naomi," [fol. 27] and stated that he wished he could find some way of forcing plaintiff to a settlement and a divorce. Another dated August 24, 1943, referred to efforts to get the pink slip for the automobile away from plaintiff and referred to exerting pressure upon her. In another dated August 14, 1943, he stated he stopped the allotment to Margaret to force her to come to terms. Also he stated that he was enclosing the pink slip to the automobile, saying "Possibly it would be best to have it transferred to you and then no one could touch it." On June 19, 1945, he referred to the automobile, stating Lloyd could continue to use it, "at any rate for the time being"; and in another dated July 21, 1945, decedent again expressed his wishes regarding the car.

Mrs. Louise Wissner testified regarding money sent to Leonard while he was in medical school in 1927 and 1929, but she was unable to state the amount thereof. She also introduced letters from Leonard sent while still in training, expressing thanks for money received, and making vague statements such as "Maybe some day we can make things right." At the time the bank account was directed to be opened in 1944 it was directed that the parents continue the purchase of bonds; but that was not done.

The testimony of defendant Leandous Wissner was indefinite and vague, both as to money sent to Leonard while at school, the amount thereof, and any promises to repay; and there is no evidence that any statement was ever sent him, or any payments made by him on account of same.

From the evidence in the case and the inferences deducible therefrom, the trial court's findings in favor of plaintiff are fully justified. Evidence and presumptions *contra* merely created a conflict which that court was authorized to resolve; and with its conclusions this court may not interfere. Furthermore, we think it is apparent that the transfers made to defendants were not made with an intent to repay them for moneys expended for his medical education, but were made in order to prevent his wife from receiving them, and to force her into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded.

[2] Regarding the right of plaintiff to recover from defendants a portion of the proceeds of the life insurance policy, it is not denied that premiums paid by decedent were paid from community funds; and that plaintiff had a vested interest in one-half of such community property cannot be gainsaid. (Civ. Code, § 161a.) In *Mazman* v. [fol. 28] *Brown*, 12 Cal. App. 2d 272, 273 [55 P. 2d 539], it was held that where insurance on a husband's life was bought and paid for with community funds, the husband could give away no more than one-half of the proceeds without the written consent of the wife. Numerous authorities so holding were there cited. Also see *Grimm* v. *Grimm*, 26 Cal. 2d 173, 175 [157 P. 2d 841]. From those decisions it is obvious that had the policy been issued by a private insurance company, no question of plaintiff's right to one-half of the proceeds could arise.

Appellants contend, however, that rights to the proceeds of a national service life insurance policy must be determined solely by federal statutes. They cite section 802(g) of title 38 U. S. C. A. [54 Stats. 1009] which provides, regarding such policies:

"The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

They particularly rely upon section 454a of the World War Veterans' Relief Act, title 38 U. S. C. A. [49 Stats. 609], which provides in part:

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, *shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*" (Italics added.) And they assert that Congress by the foregoing enactment not only intended to control the proceeds of such policies after they were paid to them, but that its power to do so is found in the provisions of the United States Constitution, article I, granting to Congress the power to "provide for the common defense and general welfare of the United States," to "raise and support armies," to "provide and maintain a Navy," to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into [fol. 29] execution the foregoing powers. They also rely upon article VI, paragraph 2, of that Constitution providing that such Constitution and the laws of the United States which shall be made in pursuance thereof, shall

be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution and laws of any state to the contrary notwithstanding.

However, the foregoing declarations are all subject to the limitations imposed by the Tenth Amendment, to wit, that the powers of the federal government are only such as are delegated, and all other powers, except such as are specifically denied to the states, repose in the states and not in the federal government; and the Fifth Amendment, providing that the Congress shall not deprive any person of life, liberty or property without due process of law, nor take his property for public use without just compensation.

The question before us, then, is did Congress intend, by section 454a, *supra*, to provide that the proceeds of a national service insurance policy, after payment of same to a named beneficiary, are not subject to the laws of a state governing title to property within that state, and, if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such wife has a vested interest.

It cannot be denied that since the enactment of section 161a of the California Civil Code in 1927, a wife in this state has a vested interest in one-half of the earnings of the spouses since that date. Such rights have been recognized by both federal and state courts. See *Lang* v. *Commissioner of Internal Revenue*, 304 U. S. 264 [58 S. Ct. 880, 82 L. Ed. 1331, 1336, 118 A. L. R. 319]; *United States* v. Malcolm, 282 U. S. 792 [51 S. Ct. 184, 75 L. Ed. 714]; *Commissioner of Internal Revenue* v. *Harmon*, 323 U. S. 44 [65 S. Ct. 103, 89 L. Ed. 60, 63, 67]; *Poe* v. *Seaborn*, 282 U. S. 101 [51 S. Ct. 58, 75 L. Ed. 239, 243]; *United States* v. *Pettigrew*, 81 F. 2d 666.

In *Mundt* v. *Connecticut Gen. Life Ins. Co.*, 35 Cal. App. 2d 416, 421 [95 P. 2d 966], decedent's mother was designated as the beneficiary of a life insurance policy paid for with community earnings. A judgment awarding one-half the proceeds to the widow was affirmed, the court saying:

"From the leading case of *New York Life Ins. Co.* v. *Bank of Italy*, 60 Cal. App. 602 [214 P. 61], through the many intervening cases, down to *Travelers Ins. Co.* v.

[fol. 30] *Fancher*, 219 Cal. 351 [26 P. 2d 482], the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the nonconsenting wife may recover an undivided one-half thereof 'without regard' [as said in *Dargie* v. *Petterson*, 176 Cal. 714, 721, 169 P. 360] 'to the amount or condition of the estate remaining in his [the husband's] hands at the time of his death', and we might add, without regard to the disproportionate size of the premium when compared with the face of the policy."

In *Bazzell* v. *Endriss*, 41 Cal. App. 2d 463 [107 P. 2d 49], the trial court found that the naming of the mother of an insured husband as beneficiary of his life insurance constituted a voluntary gift without valuable consideration, and was supported by evidence which showed that the premiums were paid from the husband's earnings during coverture and that at no time did his wife consent to a gift of her community interest in the policy. (See Civ. Code, §§ 161a, 172.)

In *Grimm* v. *Grimm*, 26 Cal. 2d 173 [157 P. 2d 841], the court said that where premiums on an insurance policy issued on the husband's life are paid with community funds, the policy is community property; and that "It is settled that even though the insurance contract may provide that the insured husband has the right to change the beneficiary without the wife's consent where she is named as such, any change of beneficiary without her consent and without a valuable consideration is voidable, and after the death of the husband the wife may maintain an action for her community share in the proceeds of the policy. (*Mazman* v. *Brown*, 12 Cal. App. 2d 272, 275 [55 P. 2d 539]; *Travelers Ins. Co.* v. *Fancher*, *supra* [219 Cal. 351], at p. 356; *Dixon Lumber Co.* v. *Peacock*, 217 Cal. 415, 418 [19 P. 2d 233]; *Blethen* v. *Pacific Mut. L. Ins. Co.*, *supra* [198 Cal. 91], at p. 101 [243 P. 431]; see 3 Cal. Jur. 10-Yr. Supp. 622; 114 A. L. R. 545, 554.)"

The principles set forth in the foregoing cases are reiterated in *Pacific Mutual Life Ins. Co.* v. *Cleverdon*, 16 Cal. 2d 788, 792 [108 P. 2d 405], though the decision in that case was different because it was found that the earnings out of which the premiums were paid were not

community property, and that they were applied to the premiums with the knowledge and consent of the surviving spouse of the insured.

Also see *In re Towey's Estate*, 22 Wn. 2d 212 [155 P. 2d 273, 275]; *In re Miller's Estate*, 44 N. M. 214 [100 P. 2d 908, 910]; *Blackmon* v. *Hansen*, 140 Tex. 536 [169 S. W. 2d 962, 965].

[fol. 31] In *Cooke* v. *Cooke*, 65 Cal. App. 2d 260, 266, 269, 272 [150 P. 2d 514] (hearing in Supreme Court denied) it was held that where premiums on an insurance policy were paid by the husband out of community funds (the earnings of the husband) the wife had a vested interest in the portion of the insurance purchased by such community funds, and was entitled to at least a proportionate amount of the proceeds of the policy paid for with community funds; and that to deprive her of it by a legislative act would be to deprive her of a vested property right of which she could not be divested without due process of law; that to do so would violate the Fourteenth Amendment to the federal Constitution, and section 13 of article I of the California Constitution.

Reasoning from the foregoing cases, the conclusion seems to follow that, in view of the Fifth Amendment, the federal government had no power to provide, as it is contended it did in section 454a, *supra*, that payments made to a beneficiary of a national service life insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary. As hereinbefore stated, appellants rely upon article VI, paragraph 2, and article I, section 8, of the United States Constitution. But no cognizance is taken of the Fifth Amendment, which limits the power of the federal government as the Fourteenth Amendment limits those of the states, and prohibits the taking of private property without due process of law. It therefore seems to follow that if, as decided in *Cooke* v. *Cooke, supra*, a surviving wife of a decedent who had paid for an insurance policy out of community funds could not be deprived of her vested interest in the proceeds of such policy without violating the provisions of the Fourteenth Amendment, the federal government could not deprive a wife of the deceased veteran of her vested right to one-half of the proceeds of a national

service life insurance policy paid for out of community funds, at least after such funds had come into the possession of a named beneficiary other than the wife, without violating the Fifth Amendment.

In the case before us the judgment was entered against the beneficiaries for one-half of the payments on the policy which they had already received, and they were ordered to pay to plaintiff one-half of proceeds received by them. Such judgment is fully in accord with the judgments in the Cooke case and other cases above cited, and cannot be said to infringe upon any rights or powers of the United States [fol. 32] under the provisions of the United States Constitution relied upon by appellants.

As said in 6 Ruling Case Law, section 436, page 440:

"The requirement of due process of law was introduced into the constitution of the United States by the fifth amendment as a limitation upon the powers of the national government, and by the fourteenth amendment as a guaranty against any encroachment upon ~~an acknowledged~~ right of citizenship by the legislatures of the states."

As to the limits of the powers of Congress, in 1 Cooley's Constitutional Limitations, eighth edition, 11, the author says:

"The government of the United States is one of *enumerated powers;* the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess."

It is said in 11 American Jurisprudence, section 334, page 1143, that: "The Fifth Amendment to the Federal Constitution prevents the Federal Government or its agencies from depriving any person of his property without due process of law. The Fourteenth Amendment to the Federal Constitution, and all the various state Constitutions, prevent any action by a state which would accomplish such deprivation." And in 12 American Jurisprudence, section 569, page 262, we find that: "The effect of the guaranty [of the Fifth and Fourteenth Amendments] is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing. *An attempt by statute to*

work such a change of ownership would be a glaring violation of this guaranty and could not be defended as an exercise of the police power. (Italics added.)

"The protection extends to rights, in the broadest sense of the term. In the determination of whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a person of his property without compensation." See *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139 [33 S. Ct. 1033, 57 L. Ed. 1427]; *Curry* v. *McCanless*, 307 U. S. 357 [59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162]. Also see 16 Corpus Juris Secundum, section 602, page 1205, stating that "a denial of due process of law results from any statute, whether state or federal, which takes away any of the essential attributes of private [fol. 33] property, . . ." (citing *Ferris* v. *Wilbur*, 27 F. 2d 262) and 12 C. J., §§486, 487, pp. 956, 957.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 [41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045], it was said that a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth Amendment (with citations). Also see *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 155 [40 S. Ct. 106, 64 L. Ed. 194, 199]. The same rule is stated in *Darlington* v. *Board of Councilmen*, 282 Ky. 778 [140 S. W. 2d 392, 396] (citing the Cohen case, *supra*), and in *Henderson* v. *Bryan*, 46 F. Supp. 682, 684, and *Schatte* v. *International Alliance, etc.*, 70 F. Supp. 1008, 1010 (decided by the same court that decided the Barton case, *infra*).

Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming, but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of national service life insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is *Barton* v. *United States*, 75 F. Supp. 703, in which a widow of a deceased veteran applied to the Administrator of Veterans' Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of

community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his decision. The Barton decision is not, of course, conclusive upon this court; and we think it is clearly distinguishable insofar as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that court decided that because of the provisions of section 454a, *supra*, the Congress intended to and did attempt to provide that where premiums on a national service life insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of decedent may be divested of her community property right by the action of the husband in [fol. 34] using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case.

Also see *Bostrom* v. *Bostrom*, 60 N. D. 792 [236 N. W. 732]; *Lewis* v. *Lewis*, 34 Cal. App. 2d 422 [93 P. 2d 850]; *Baker* v. *Tulsa Building & Loan Assn.*, 179 Okla. 432 [66 P. 2d 45]; *Miller* v. *McKenna*, 23 Cal. 2d 774, 783 [147 P. 2d 531].

[3] The one remaining point on this appeal is whether the trial court erred in allowing the plaintiff one-half the value of the automobile at the time it was transferred to appellants, or whether plaintiff was entitled to one-half of the $1,080 received from sale of same after the death of Leonard Wissner. The trial court found that the value of the car at the time it was transferred to defendants was $1,600, and awarded plaintiff judgment for one-half of the value thereof. That the said automobile was community property cannot be questioned, since it was paid for with the community earnings of the spouses after their marriage in 1930, including the earnings of plaintiff who made the final payments out of her own earnings after her husband entered the service. She testified that she did not know of

the transfer until after the death of her husband, after which she made demand therefor. The trial court found that the transfer was without consideration, and the evidence sustains that finding. It might be questioned, in view of the evidence, whether the decedent ever intended to transfer the ownership of the automobile to his parents at all. However, they assert ownership, and it may be presumed that such ownership was acquired when the car and pink slip were delivered to them, as there is nothing to show a later acquisition of title. The trial court, then, may well have concluded that it was transferred to them at that time, and when its value was $1,600. So determining, its finding that plaintiff is entitled to one-half of its value at that time is supported by the record. Defendants knew that it was the community property of plaintiff and their son, and they may be said to have converted it to their own use at the time of the transfer. Section 3336 of the Civil Code thus became applicable as to the amount of recovery from the convertor, to wit, the value of the property at the time of conversion. And if defendants, having notice of plaintiff's rights, as they had, chose to sell the vehicle, they must respond to [fol. 35] the owner for its value, regardless of the price at which they chose to sell it. (*A. Meister & Sons Co. v. Harrison*, 56 Cal. App. 679, 681 [206 P. 106]).

The judgment is affirmed.

Peek, J., and Thompson, J., concurred.

[fol. 36] In the District Court of Appeal of the State of California in and for the Third Appellate District

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Wissner v. Wissner

Order Denying Petition for Rehearing—February 11, 1949

By the Court:

Appellants' petition for rehearing is denied.

(No opinion filed.)

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 37] IN THE SUPREME COURT OF CALIFORNIA

In Bank

WISSNER

v.

WISSNER *et al.*

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—Filed March 21, 1949

Appellants' petition for hearing Denied.
Schauer, J., voting for a hearing.

Gibson, Chief Justice.

Dated March 21, 1949.

[File endorsement omitted.]

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 38] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed May 16, 1949

PETITION FOR APPEAL

To the Honorable Annette Adams, Presiding Justice of the District Court of Appeal of the State of California, Third Appellate District:

Considering themselves aggrieved by the final decision of the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause, appellants therein, Louise M. Wissner and Leandous H. Wissner, hereby pray that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said appellants, Louise M. Wissner and Leandous H. Wissner, assign the following errors in the record and proceedings in the said cause;

1. The District Court of Appeal of the State of California, [fol. 39] Third Appellate District, erred in affirming a judgment of the Superior Court of the State of California in and for the County of Stanislaus which awarded one-half the proceeds, paid and to be paid, of a National Service Life Insurance policy to appellee, a soldier's widow, under the community property law of the state when the soldier had designated appellants, his parents, the beneficiaries of the policy and the federal statutes provide:

> "Payments made to, or on account of, a beneficiary under any of the laws relating to veterans * * * shall not be liable to attachment, levy, or seizure by or under any legal or equitable process, whatever, either before or after receipt by the beneficiary."

and thereby deprived appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The District Court of Appeal of the State of California, Third Appellate District, erred in applying the provisions of the California community property law and in awarding one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, to appellee and thereby deprived appellants of their property contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it failed to apply the provisions of an act of the Congress and awarded appellee judgment for one-half the proceeds of a National Service Life Insurance policy.

4. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of

[fol. 40] their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress and held that the provisions of the act were invalid under the Fifth Amendment to the Constitution of the United States.

5. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it held that the provisions of an act of the Congress were invalid under the Tenth Amendment to the Constitution of the United States and refused to apply them on appellants' behalf.

6. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it ignored the provisions of Article VI, paragraph 2 of the Constitution of the United States and awarded appellee one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, by applying California laws relating to community property and ignoring the provisions of the federal statutes in conflict therewith.

7. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress in appellants behalf and held that the provisions of the act were void under the Fifth and Tenth Amendments to the Constitution of the United States.

[fol. 41] PRAYER FOR REVERSAL

For which errors the appellants, Louise M. Wissner and Leandous H. Wisner, pray that the judgment of the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause, in so far as it effects the rights of the appellants to retain the proceeds of a National Service Life Insurance policy, be reversed and a judg-

ment rendered in favor of the said appellants on said issues and for costs.

Dated: May 16, 1949.

Vernon F. Gant, W. Coburn Cook, Carlos J. Badger, Counsel for Appellants.

[File endorsement omitted.]

[fol. 42] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 16, 1949

The appellants in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from that portion of the judgment rendered in said cause by the District Court of Appeal of the State of California, Third Appellate District, which affects the rights of the appellants to retain the proceeds of a National Service Life Insurance policy, paid and to be paid, and having presented and filed the petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause as provided by law; and

It is further ordered that the Clerk of the District Court of Appeal of the State of California, Third Appellate District, shall prepare and certify a transcript of the record, [fol. 43] proceedings and judgment in said cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty days of this date;

And it is further ordered that security for costs on appeal be fixed in the sum of Two Hundred Fifty and no/100 ($250.00) Dollars.

Dated: May 16, 1949.

Adams, Presiding Justice of the District Court of Appeal of the State of California, Third Appellate District.

[fols. 44-48] Bond on appeal for $250.00 approved and filed May 16, 1949, omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 23, 1949

To the Clerk of the District Court of Appeal of the State of California, Third Appellate District:

You are hereby requested to prepare a transcript of the record in this case and transmit it to the Supreme Court of the United States at Washington, D. C. duly certified and authenticated and within the time prescribed by the rules of the Supreme Court of the United States, consisting of the following documents and portions of the record in this cause, which constitute the record on appeal to the Supreme Court of the United States:

1. The following portions of the Clerk's Transcript.
   a. Amended Complaint (C.T. 1-10)
   b. Answer to Amended Complaint (C.T. 16-21)
   c. Findings, Conclusion and Judgment (C.T. 27-38)
   d. Notice of Appeal (C.T. 40)

2. Opinion and Judgment of the District Court of Appeal of the State of California, Third Appellate District.

3. Order Denying Rehearing in the District Court of Ap-
[fol. 50] peal of the State of California, Third Appellate District.

4. Order Denying Hearing in the Supreme Court of the State of California.

5. Petition for Appeal, Assignment of Errors and Prayer for Reversal.

6. Order Allowing Appeal.

7. Bond for Costs.

8. Citation.

9. Statement as to Jurisdiction.

10. Statement Directing Attention to Paragraph 3 of Rule 12.

11. This Praecipe.

Dated at Modesto, California, this 19th day of May, 1949.

Vernon F. Gant, Carlos J. Badger, W. Coburn Cook, Counsel for Appellants.

Received copy of the within Praecipe this 19th day of May, 1949.

Cleary & Zeff, by Leslie A. Cleary, Counsel for Appellee.

[File endorsement omitted.]

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 52-53] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS INTENDED TO BE RELIED ON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—filed June 14, 1949

Appellants adopt their assignment of errors as a statement of the points to be relied on in this Court and represent that all of the record designated in appellants' praecipe to the Clerk of the District Court of Appeal of the State of California, Third Appellate District is necessary for the consideration of the case and that only that part of the record so designated is necessary for the consideration of the case.

W. Coburn Cook, Vernon F. Gant, Carlos J. Badger, Counsel for Appellants.

Received copy of the foregoing Statement of Points and Designation of Part of the Record to be Printed this 9th day of June, 1949.

Cleary & Zeff, by Leslie A. Cleary, Counsel for Appellee.

[fol. 54] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER, et al., Appellants,

vs.

MARGARET WISSNER

ORDER NOTING PROBABLE JURISDICTION—October 10, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: Enter W. Colburn Cook. File No. 53,866 California, District Court of Appeal, Third Appellate District, Term No. 119. Louise M. Wissner and Leandous H. Wissner, Appellants, vs. Margaret Wissner. Filed June 14, 1949. Term No. 119 O. T. 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

v.

MARGARET WISSNER, *Appellee*

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

VERNON F. GANT,
CARLOS J. BADGER,
W. COBURN COOK,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

v.

MARGARET WISSNER, *Appellee*

STATEMENT AS TO JURISDICTION

Statement of the Case

All facts necessary for the determination of the questions involved are admitted in the pleadings (R. 1-7 and 9-12).

Issues involving property other than the proceeds of the National Service Life Insurance policy with which we are concerned have been settled by the decision of the court below.

Appellants are the mother and father of Dr. Leonard O. Wissner who at the time of his death in Kalai Kunda, India, on November 14, 1945, was a Major in the United States Army (R. 14, 16). Appellee is his surviving widow (R. 14).

Dr. Wissner and appellee were married at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and

up to the death of Leonard O. Wissner were husband and wife and at all times subsequent to the marriage and until his death were residents of and domiciled in the State of California (R. 14).

While Dr. Wissner was serving in the army, he applied for and there was issued to him a National Service Life Insurance policy No. 14N8656931 (R. 3, 10), the premiums of which were paid by Dr. Wissner from his army pay (R. 10, 17). He designated his mother, Louise M. Wissner, as principal beneficiary of the policy and his father, Leandous H. Wissner, as contingent beneficiary (R. 17). The policy was in full force and effect at the time of the Doctor's death (R. 30) and since that time the Doctor's mother, appellant, Louise M. Wissner, has received funds amounting to $76.70 for each month (R. 18).

Appellee claims to be entitled to one-half of this payment as received each month under the community property laws of the State of California. The state courts found in favor of appellee's claim and refused to apply the provisions of the federal statutes which control the rights in the proceeds of National Service Life Insurance (R. 19).

The matter is of great importance to the residents of the eleven community property states since, as the court will take judicial notice, millions of government life insurance policies were issued to members of the armed forces in the first and second world wars and a majority of the men taking out these policies are now or will be married and many may desire to designate someone other than their wife as beneficiary of their insurance. The decision of the court below nullifies the clear intent of one soldier in this regard and thereby seriously circumscribes the value of government life insurance to many present and prospective owners.

To counsels' knowledge ten cases[1] involving this question have been filed in the County of Los Angeles alone, and if the decision of the court below is correct, there will be hundreds of new cases filed because the United States is paying money every day to the designated beneficiaries of these insurance policies and ignoring the claimed rights of widows in one-half the payments as community property.

Opinion Below

The Superior Court rendered no opinion; its findings of fact, conclusions of law and judgment are at (R. pp. 27-38). The opinion of the District Court of Appeal (Appendix A) filed January 21, 1949, is reported in 89 A. C. A. 857, 201 Pacific 2d 837. The Appellate Court denied rehearing without opinion (R. 36). The Supreme Court of California denied a hearing without opinion (R. 37).

Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the jurisdiction of this court are Title 28, U. S. Code, Section 1257 (1) and (2) and under the authority of *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547, and *Flournoy* v. *Weiner*, 321 U. S. 253, 263, the right to a review of the judgment of the lower court by writ of certiorari under Title 28, U. S. Code, Section 1257 (3) is also presented herein.

---

[1] *James* v. *United States, et al.*, No. 6061-BH (S. D. Cal.); *Barton* v. *United States, et al.*, No. 5527-WM (S. D. Cal.) 75 Fed. Supp. 703; *Rhodes* v. *United States of America, et al.*, No. 5845-B (S. D. Cal.); *Hayek* v. *Hayek and the United States of America*, No. 7400-W (S. D. Cal.); *Angel L. Pack* v. *United States of America and Lilly Pack*, No. 7651-BH (S. D. Cal.) Appealed to the Ninth Circuit; *Nobles* v. *Cannell*, No. 502587, Superior Court in and for the County and City of Los Angeles; *Johnson* v. *Shelton*, No. 522648, Superior Court in and for the County and City of Los Angeles; *Carballo* v. *McFann*, No. 543410, Superior Court in and for the County and City of Los Angeles; *Cora Belle Bennett* v. *Modesta Lee Bennett*, No. 503386, Superior Court in and for the County and City of Los Angeles; *Amy Jean Dodart* v. *United States, et al.*, 8201-WM (S. D. Cal.).

Statutes Involved

The federal statute, the provisions of which were held inapplicable and void is Section 3, 49 Statute 609, 38 U. S. C. A. Section 454a, Act of August 12, 1935, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and *shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary* • • •" (Italics ours.)

The provisions of the state statute which the court applied and which appellants claim are inapplicable to the case and void as applied by the lower court to the property involved are Civil Code of California, Sections 162, 163, 164, 161a.

> Section 162. "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."

> Section 163. "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."

> Section 164. "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; • • •"

> Section 161a. "The respective interest of the husband and wife in community property during continuance of the marriage relation are present, existing and equal

interest under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Date of Judgment and Application for Appeal

The decision and judgment of the District Court of Appeal were filed January 21, 1949 (R. 23). A petition for rehearing was denied February 11, 1949 (R. 36).

The District Court of Appeal is the highest court of the State in which decision could be had unless a hearing were granted by the Supreme Court of California at its discretion (Constitution of California, Article VI, Secs. 4, 4a, 4b, 4c). A hearing was denied March 21, 1949 (R. 37).

The application for appeal was presented May 16, 1949.

Cases Believed to Sustain Jurisdiction of this Court

Cases believed to sustain the jurisdiction of this court are:

Logan County National Bank v. *Townsend*, 139 U. S. 67, 72;

Toledo etc. Railroad Company v. *Slavin*, 236 U. S. 454, 457;

Green Bay Canal Co. v. *Patten Paper Co.*, 172 U. S. 58, 66;

Missouri etc. R. Co. v. *Haber*, 169 U. S. 613, 621-622;

McGuire v. *Massachusetts*, 3 Wall. 382, 385;

Garrett v. *Moore-McCormack*, 317 U. S. 239, 245-246;

Flournoy v. *Weiner*, 321 U. S. 253, 263;

Anderson v. *Carkins*, 135 U. S. 483, 485, 486;

Clearfield Trust Co. v. *United States*, 318 U. S. 363, 366;

United States v. *Emory*, 314 U. S. 423, 426-427.

Raising the Federal Questions

Appellants raised the federal questions in their answer (R. 18) pressed them throughout the case, argued them in all briefs on appeal[2] and the federal questions were expressly passed on by the District Court of Appeal of the State of California Third Appellate District (Appendix A pages 14-26 herein) (R. 70-84).

The Appellate Court in its opinion summarizes appellants' contentions made in their briefs and argument on appeal as follows:

> "Appellants contend, however, that rights to the proceeds of a National Service Life Insurance policy must be determined solely by federal statutes. They cite section 802 (g) of Title 38 U. S. C. A. which provides, regarding such policies: 'The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.'
>
> "They particularly rely upon section 454a of the World War Veterans' Relief Act, Title 38 U. S. C. A., which provides in part: 'Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, *shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or*

[2] Under the California practice, an appeal is taken merely by notice (R. 40) and there is no assignment of errors. The questions presented on appeal are stated only in the briefs.

seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.' (Italics added.)

"And they assert that Congress by the foregoing enactment not only intended to control the proceeds of such policies after they were paid to them, but that its power to do so is found in the provisions of the United States Constitution, art. I, § 8, granting to Congress the power to 'provide for the common Defense and general Welfare of the United States,' to 'raise and support Armies,' to 'provide and maintain a Navy', to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. They also rely upon art. VI, paragraph 2, of that Constitution providing that such Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding" (Appendix A, pp. 18-19) (R. 75-76).

The court below affirmed the judgment of the lower court awarding one-half of the proceeds of the National Service Life Insurance policy to appellee in these words:

"In the case before us the judgment was entered against the beneficiaries for one-half of the payments on the policy which they had already received, and they were ordered to pay to plaintiff one-half of proceeds received by them. Such judgment is fully in accord with the judgments in the Cooke case and other cases above cited, and cannot be said to infringe upon any rights or powers of the United States under the provisions of the United States Constitution relied upon by appellants" (Appendix A, p. 22) (R. 86).

The court stated that the question to be decided on appeal was:

"The question before us, then, is did Congress intend, by section 454a, supra, to provide that the

proceeds of a National Service Insurance policy, after payment of same to a named beneficiary, are not subject to the laws of a state governing title to property within that state, and, if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such wife has a vested interest" (Appendix A., pp. 19-20) (R. 77).

and in deciding the question said as follows:

"Reasoning from the foregoing cases, the conclusion seems to follow that, in view of the Fifth Amendment, the federal government *had no power to provide*, as it is contended it did in section 454a, supra, that payments made to a beneficiary of a National Service Life Insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary" (Appendix A, p. 22) (R. 79). (First italics ours.)

and continued as follows:

"As hereinbefore stated, appellants rely upon art. VI, paragraph 2, and art. I, sec. 8, of the United States Constitution. But no cognizance is taken of the Fifth Amendment, which limits the power of the Federal government as the Fourteenth Amendment limits those of the states, and prohibits the taking of private property without due process of law. It therefore seems to follow that if, as decided in Cooke *v.* Cooke, supra, a surviving wife of a decedent who had paid for an insurance policy out of community funds could not be deprived of her vested interest in the proceeds of such policy without violating the provisions of the Fourteenth Amendment, the Federal government could not deprive a wife of the deceased veteran of her vested right to one-half of the proceeds of a National Service Life Insurance policy paid for out of community funds, at least after such funds had come into the possession of

a named beneficiary other than the wife, without violating the Fifth Amendment" (Appendix A, p. 22) (R. 79-80).

and the court below expressly disagreed with the decision of a Federal District Court in this state which had held that the Federal statutes relied upon by the appellants controlled the rights in the proceeds of a National Service Life Insurance policy and that the California community property laws were not applicable and in disagreeing with the Federal Court said:-

"appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming, but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of National Service Life Insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is Barton *v.* United States, D. C., 75 F. Supp. 703, in which a widow of a deceased veteran applied to the Administrator of Veterans' Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his decision. The Barton decision is not, of course, conclusive upon this court; and we think it is clearly distinguishable in so far as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that court decided that because

of the provisions of section 454a, supra, the Congress intended to and did attempt to provide that where premiums on a National Service Life Insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of decedent may be divested of her community property right by the action of the husband in using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case" (Appendix A, pp. 24-25) (R. 82-83).

Grounds Upon Which It Is Contended the Questions Involved Are Substantial

The result of the decision of the court below is to take one-half of the proceeds of a National Service Life Insurance policy, paid and to be paid, to the parents of the deceased soldier as he intended them to be paid and to deliver them to his widow with whom he was estranged. The result is reached by applying the state statutes to the determination of the controversy and refusing to apply the federal statutes which created the insurance and which provide:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary • • •."

(a) The court below is in direct conflict with basic principles of law followed by this Court in:

White v. *United States*, 270 U. S. 175;

Lynch v. *United States*, 292 U. S. 571, 577-579;
United States v. *County of Allegheny*, 322 U. S. 174, 183;
Clearfield Trust Co. v. *United States*, 318 U. S. 363, 366;
Lawrence v. *Shaw*, 300 U. S. 245;
United States v. *Williams*, 302 U. S. 46;
Erie Railroad Company v. *Tompkins*, 304 U. S. 64 dicta 78, 79;
United States v. *Emory*, 314 U. S. 423;
Tennessee v. *Davis*, 100 U. S. 257, 262-264.

(b) It is also in direct conflict with cases in other jurisdictions construing this act. The following among many others involving government insurance have applied the rules contained in the federal statutes to determine the rights of the parties rather than the conflicting state rules. So far as we are informed, no reported case agrees with the court below:

United States v. *Sterling* (C. C. A. 2), 12 Fed. 2d 921, 922;
Woodward v. *United States* (C. C. A. 8), 167 Fed. 2d 774, 778;
Cassarello v. *United States* (C. C. A. 3), 279 Fed. 396, 398;
United States v. *Fuller* (C. C. A. 5), 97 Fed. 2d 541;
Lewis v. *United States* (C. C. A. 3), 56 Fed. 2d. 563, 564;
Bradley v. *United States* (C. C. A. 10), 143 Fed. 2d 573;
Robertson v. *McSpadden* (Dist. Ct. E. D. Ark. N. D.), 46 Fed. 2d 702;
Tomkins v. *Tomkins*, 132 N. J. L. 217, 38 Atl. 2d 890;
Sizemore v. *Sizemore's Guardian, et al.*, 222 Ky. 713, 2 S. W. 2d 395, 396-7;
Maddox v. *Elliot*, 248 Ala. 271, 27 So. 2d 498, 499;

Murphy v. *United States*, (Dist. Ct. D. Mass.) 5 Fed. Supp. 583, 584;

Washburn v. *United States*, (Dist. Ct. W. D. Mo.) 63 Fed. Supp. 224, 227;

Suttons' Ex'r v. *Barr's Adm'r*, 219 Ky. 543, 293 S. W. 1075.

(c) The decision of the court below is also in direct conflict with cases in California which have applied the federal statutory rules rather than the conflicting state rules.

The section of the statute involved in the case at bar was considered binding and followed in *Culp* v. *Webster*, 25 Cal. App. Supp. 2d 759, 70 Pacific 2d 273.

The decision of the court below is in direct conflict with cases arising in the State of California involving community property; *Barton* v. *U. S.*, 75 Fed. Supp 703—the decision with which the court below respectfully disagrees, *Johnson* v. *Shelton*, No. 522648, Superior Court in and for the County and City of Los Angeles, Memorandum Ruling printed herein, (Appendix B, pp. 26-30) a decision expressly disagreeing with the court below, *James* v. *U. S.*, No. 6061-BH, Southern District of California, an unreported case, Findings of Fact and Conclusions of Law printed herein, (Appendix C, pp. 30-34) *Rhodes* v. *United States, et al.*, No. 5845-B, Southern District of California; *Hayek* v. *Hayek and United States*, No. 7400-W, Southern District of California; *Angel L. Pack* v. *United States and Lilly Pack*, No. 7051-BH, Southern District of California appealed to the United States Court of Appeals for the Ninth Circuit and hearing there had on April 20, 1949. *Nobles* v. *Cannell*, No. 502587, in which the Superior Court for the County and City of Los Angeles made among others the following conclusion:

"the community property laws of the State of California confer no rights on plaintiff to share in the pro-

ceeds of the policy involved in this action since it was the purpose of the Congress of the United States to provide in all details for the issuance and administration and settlement of National Service Life Insurance on a National basis, and state laws or their administration may not interfere with the carrying out of a National purpose."

Conclusion

We respectfully submit that this Court has jurisdiction of the appeal.

Dated: May 16, 1949.

Respectfully submitted,

W. Colburn Cook,
Vernon F. Gant,
Carlos J. Badger,
Counsel for Appellants.

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

(Stanislaus)

Civ. No. 7528

Sac. No. 5936

MARGARET V. WISSNER, *Plaintiff and Respondent*,

vs.

LOUISE M. WISSNER and LEANDOUS H. WISSNER, *Defendants and Appellants*

Filed: Jan. 21, 1949

Plaintiff, respondent before this court, brought this action against Louise and Leandous Wissner, the parents of plaintiff's deceased husband, Leonard O. Wissner. The complaint alleged that plaintiff and said decedent were married in California in 1930; that at the time of said marriage decedent had no property and that all property which he thereafter acquired was community property acquired by the joint efforts of the spouses; that Leonard died testate on November 14, 1945, leaving plaintiff as his surviving widow; that during the marriage the husband Leonard made transfers of community property to defendants, consisting of money, stocks, bonds and an automobile, without plaintiff's knowledge or consent and without consideration, and as a result plaintiff was defrauded of her community interest in such transferred assets; and that defendants refused to account to plaintiff for such assets and claimed to be the owners thereof, though they were without right, title or interest therein or thereto.

In a second count plaintiff alleged that decedent had served in the army for several years prior to his death, and had taken out a National Service Life Insurance Policy in the sum of $10,000.00; that he had paid the premiums thereon from his salary, which was community property, but had, without plaintiff's knowledge or consent, made his

mother principal beneficiary and his father contingent beneficiary thereof; and that since the death of plaintiff's said husband defendants had received from the proceeds of said policy $882.05, but refused on demand to pay to plaintiff any portion thereof.

A third cause of action was stated, but it is not involved in this appeal.

As an answer to plaintiff's first cause of action defendants set up that moneys which decedent had paid over to them had been paid to them to satisfy a debt of decedent to them for aid and assistance which they had given him during his attendance at medical school. As for the second cause of action, they conceded that premiums on the life insurance policy had been paid with community funds, but alleged that the proceeds of such policy were payable to them alone by virtue of the federal statutes governing the issuance of such policies, and that such statutes alone controlled, and prohibited plaintiff from claiming any interest therein.

After trial of the issues findings were made in favor of plaintiff on the first and second causes of action; and from the judgment which followed defendants have appealed, raising two issues, the first, whether the evidence supports the finding that the transfers to defendants were without consideration; and, second, whether the community property law of California gives plaintiff a right to any part of the proceeds of the life insurance policy.

We are satisfied that there is sufficient evidence to support the conclusion of the trial court on the first count. Defendants admitted that during his service in the army, decedent, who was first a captain and then a major, had paid to them approximately $3000 in cash, and that he transferred to them an automobile which had been purchased in 1939. The moneys turned over were deposited in a joint bank account in the names of defendants and decedent, upon which both decedent and defendant Louise Wissner drew checks. After Leonard's death the defendants withdrew the balance remaining in the account. The automobile pink slip was received by defendants from their son in the fall of 1943, and they sold the automobile after his death for $1080.00.

In a letter written by Leonard from India on October 22, 1944, beginning "Dear Folks All," which letter was delivered to the Bank of America, Modesto, by defendants, he stated that he had already sent a check for $30.00 and was enclosing another for $90.91. He then added: "I want a bank account, probably commercial, to be held jointly by you folks and by me. I want the allotments to be deposited in it. I want a reserve of $250 to $500 to be allowed to accumulate and the bonds to be purchased as I previously instructed them, and turned over to you for safekeeping. I want a routine accounting sent to you and referred to me as you think best or necessary. I would like to have a check book sent me in case of need. Please make this all very clear to the bank. Present this letter if necessary." The evidence shows that the joint account between the defendants and their son was opened November 10, 1944, with an initial deposit of $337.50. Thereafter 12 deposits of like amounts were made through allottments by decedent directly to the bank, and there were others. Decedent from time to time drew upon the account and once his mother drew $500 and sent it to him. After Leonard's death she withdrew the balance and deposited it in defendants' own account with the American Trust Company. The Bank of America account was then closed.

Mrs. Wissner testified that $2906.27 and the money for the automobile was all defendants received. She stated that prior to the time this account was opened the bank had been buying bonds for decedent out of funds sent it by Leonard, which bonds were in the names of decedent and one Naomi Beiler; that the bank had mailed the bonds to defendants who had put them in a safe deposit box, and after Leonard's death, had turned them over to the attorney for his estate.

Plaintiff testified that she and Leonard were married in 1930, before the latter had completed his medical training. She was a nurse, and continued to practice her profession, her earnings being put into a joint account with her husband, which account continued until November, 1944, at which time Leonard withdrew all of the balance. Regarding the automobile turned over to defendants, she stated that she finished payments thereon after her hus-

band went into the service. For six months after he went into the service plaintiff received an allotment of $90 per month, then it was discontinued.

Lloyd Wissner, brother of Leonard, testified regarding letters which he received from Leonard. One, dated September 26, 1943, requested Lloyd to get the doctor's instruments and equipment moved "before M. receives the notice that I have stopped her allotment." In another dated January 7, 1943, he stated that he wished his attorney could get an insurance policy away from plaintiff. In one dated September 14, 1943, Leonard mentioned "Naomi," and stated that he wished he could find some way of forcing plaintiff to a settlement and a divorce. Another dated August 24, 1943, referred to efforts to get the pink slip for the automobile away from plaintiff and referred to exerting pressure upon her. In another dated August 14, 1943, he stated he stopped the allotment to Margaret to force her to come to terms. Also he stated that he was enclosing the pink slip to the automobile, saying, "Possibly it would be best to have it transferred to you and then no one could touch it." On June 19, 1945, he referred to the automobile, stating Lloyd could continue to use it, "at any rate for the time being"; and in another dated July 21, 1945, decedent again expressed his wishes regarding the car.

Mrs. Louise Wissner testified regarding moneys sent to Leonard while he was in Medical school in 1927 and 1929, but she was unable to state the amount thereof. She also introduced letters from Leonard sent while still in training, expressing thanks for money received, and making vague statements such as, "Maybe some day we can make things right." At the time the bank account was directed to be opened in 1944 it was directed that the parents continue the purchase of bonds; but that was not done.

The testimony of defendant Leandous Wissner was indefinite and vague, both as to moneys sent to Leonard while at school, the amount thereof, and any promises to repay; and there is no evidence that any statement was ever sent him, or any payments made by him on account of same.

From the evidence in the case and the inferences deducible therefrom, the trial court's findings in favor of plaintiff are fully justified. Evidence and presumptions

contra merely created a conflict which that court was authorized to resolve; and with its conclusions this court may not interfere. Furthermore, we think it is apparent that the transfers made to defendants were not made with an intent to repay them for moneys expended for his medical education, but were made in order to prevent his wife from receiving them, and to force her into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded.

Regarding the right of plaintiff to recover from defendants a portion of the proceeds of the life insurance policy, it is not denied that premiums paid by decedent were paid from community funds; and that plaintiff had a vested interest in one-half of such community property cannot be gainsaid. (Civ. Code, sec. 161a.) In Mazman *v.* Brown, 12 Cal. App. 2d 272, 273, it was held that where insurance on a husband's life was bought and paid for with community funds, the husband could give away no more than one-half of the proceeds without the written consent of the wife. Numerous authorities so holding were there cited. Also see Grimm *v.* Grimm, 26 Cal. 2d 173, 175. From those decisions it is obvious that had the policy been issued by a private insurance company, no question of plaintiff's right to one-half of the proceeds could arise.

Appellants contend, however, that rights to the proceeds of a National Service Life Insurance Policy must be determined solely by federal statutes. They cite section 802(g) of Title 38 U. S. C. A. which provides, regarding such policies:

> "The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

They particularly rely upon section 454a of the World War Veterans' Relief Act, Title 38 U. S. C. A., which provides in part:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, *shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*" (Italics added.)

And they assert that Congress by the foregoing enactment not only intended to control the proceeds of such policies after they were paid to them, but that its power to do so is found in the provisions of the United States Constitution, art. I, § 8 granting to Congress the power to "provide for the common defense and general welfare of the United States," to "raise and support armies," to "provide and maintain a Navy," to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. They also rely upon Art. VI, paragraph 2, of that Constitution providing that such Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding.

However, the foregoing declarations are all subject to the limitations imposed by the Tenth Amendment, to wit, that the powers of the Federal government are only such as are delegated and all other powers, except such as are specifically denied to the states, repose in the states and not in the Federal government; and the Fifth Amendment, providing that the Congress shall not deprive any person of life, liberty or property without due process of law, nor take his property for public use without just compensation.

The question before us, then, is did Congress intend, by section 454a, supra, to provide that the proceeds of a

National Service Insurance policy, after payment of same to a named beneficiary, are not subject to the laws of a state governing title to property within that State, and, if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such wife has a vested interest.

It cannot be denied that since the enactment of section 161a of the California Civil Code in 1927, a wife in this state has a vested interest in one-half of the earnings of the spouse since that date. Such rights have been recognized by both federal and state courts. See Lang *v.* Commissioner of Internal Revenue, 304 U. S. 264, 82 L. Ed. 1331, 1336; United States *v.* Malcolm, 282 U. S. 792, 75 L. Ed. 714; Commissioner of Internal Revenue *v.* Harmon, 323 U. S. 44, 89 L. Ed. 60, 63, 67; Poe *v.* Seaborn, 282 U. S. 101, 75 L. Ed. 239, 243; United States *v.* Pettigrew, 81 Fed. 2d 666.

In Mundt *v.* Connecticut Gen. Life Ins. Co., 35 Cal. App. 2d 416, 421, decedent's mother was designated as the beneficiary of a life insurance policy paid for with community earnings. A judgment awarding one-half the proceeds to the widow was affirmed, the court saying:

> "From the leading case of New York Life Ins. Co. *v.* Bank of Italy, 60 Cal. App. 602 (214 Pac. 61), through the many intervening cases, down to Travelers Ins. Co. *v.* Fancher, 219 Cal. 351 (26 Pac. (2d) 482), the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the non-consenting wife may recover an undivided one-half thereof 'without regard' (as said in Dargie *v.* Patterson, 176 Cal. 714, 721, 169 Pac. 360) 'to the amount or condition of the estate remaining in his (the husband's) hands at the time of his death', and we might add, without regard to the disproportionate size of the premium when compared with the face of the policy."

In Bazzell Endriss, 41 Cal. App. 2d 463, the trial court found that the naming of the mother of an insured husband

as beneficiary of his life insurance constituted a voluntary gift without valuable consideration, and was supported by evidence which showed that the premiums were paid from the husband's earnings during coverture and that at no time did his wife consent to a gift of her community interest in the policy. (See Civ. Code, secs. 161a, 172.)

In Grimm *v.* Grimm, 26 Cal. 2d 173, the court said that where premiums on an insurance policy issued on the husband's life are paid with community funds, the policy is community property; and that "It is settled that even though the insurance contract may provide that the insured husband has the right to change the beneficiary without the wife's consent where she is named as such, any change of beneficiary without her consent and without a valuable consideration is voidable, and after the death of the husband the wife may maintain an action for community share in the proceeds of the policy. (Mazman *v.* Brown, 12 Cal. App. 2d 272, 275 (55 P. 2d 539); Travelers Ins. Co. *v.* Fancher, supra (219 Cal. 351), at p. 356; Dixon Lumber Co. *v.* Peacock, 217 Cal. 415, 418 (19 P. 2d 233); Blethen *v.* Pacific Mut. L. Ins. Co. supra (198 Cal. 91), at p. 101; see 3 Cal. Jur. 10-yr. Supp. 622; 114 A. L. R. 545, 554.)"

The principles set forth in the foregoing cases are reiterated in Pacific Mutual Life Insurance Co. *v.* Cleverdon, 16 Cal. 2d 788, 792, though the decision in that case was different because it was found that the earnings out of which the premiums were paid were not community property, and that they were applied to the premiums with the knowledge and consent of the surviving spouse of the insured.

Also see In re Towey's Estate (Wash.), 155 Pac. 2d 273, 275; In re Miller's Estate (N. Mex.), 100 Pac. 2d 908, 910; Blackmon *v.* Hansen (Tex.), 169 S. W. 2d 962, 965.

In Cooke *v.* Cooke, 65 Cal. App. 2d 260, 266, 269, 272 (hearing in Supreme Court denied) it was held that where premiums on an insurance policy were paid by the husband out of community funds (the earnings of the husband) the wife had a vested interest in the portion of the insurance purchased by such community funds, and was entitled to at least a proportionate amount of the proceeds of the policy paid for with community funds; and that to deprive her of it by a legislative act would be to deprive her of a vested

property right of which she could not be divested without due process of law; that to do so would violate the Fourteenth Amendment to the Federal Constitution, and section 13 of Art. I of the California Constitution.

Reasoning from the foregoing cases, the conclusion seems to follow that, in view of the Fifth Amendment, the Federal government had no power to provide, as it is contended it did in section 454a, supra, that payments made to a beneficiary of a National Service Life Insurance Policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary. As hereinbefore stated, appellants rely upon Art. VI, paragraph 2, and Art. I, sec. 8, of the United States Constitution. But no cognizance is taken of the Fifth Amendment, which limits the power of the Federal government as the Fourteenth Amendment limits those of the states, and prohibits the taking of private property without due process of law. It therefore seems to follow that if, as decided in Cooke *v.* Cooke, supra, a surviving wife of a decedent who had paid for an insurance policy out of community funds could not be deprived of her vested interest in the proceeds of such policy without violating the provisions of the Fourteenth Amendment, the Federal government could not deprive a wife of the deceased veteran of her vested right to one-half of the proceeds of a National Service Life Insurance policy paid for out of community funds, at least after such funds had come into the possession of a named beneficiary other than the wife, without violating the Fifth Amendment.

In the case before us the judgment was entered against the beneficiaries for one-half of the payments on the policy which they had already received, and they were ordered to pay to plaintiff one-half of proceeds received by them. Such judgment is fully in accord with the judgments in the Cooke case and other cases above cited, and cannot be said to infringe upon any rights or powers of the United States under the provisions of the United States Constitution relied upon by appellants.

As said in 6 R. C. L., sec. 436, pp. 440:

"The requirement of due process of law was introduced into the constitution of the United States by the fifth amendment as a limitation upon the powers of the national government, and by the fourteenth amendment as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states."

As to the limits of the powers of Congress, in 1 Cooley's Constitutional Limitations, Eighth Edition, 11, the author says;

"The government of the United States is one of *enumerated powers;* the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess."

It is said in 11 Am. Jur., sec 334, p. 1143, that: "The Fifth Amendment to the Federal Constitution prevents the Federal Government or its agencies from depriving any person of his property without due process of law. The Fourteenth Amendment to the Federal Constitution, and all the various state Constitutions, prevent any action by a state which would accomplish such deprivation." And in 12 Am. Jur., Sec. 569, p. 262, we find that: "The effect of the guaranty (of the Fifth and Fourteenth Amendments) is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing. *An attempt by statute to work such a change of ownership would be a glaring violation of this guaranty and could not be defended as an exercise of the police power.* (Italics added.)

"The protection extends to rights, in the broadest sense of the term. In the determination of whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a person of his property without compensation." See Ochoa *v.* Hernandez y Morales, 230 U. S. 139, 57 L. Ed. 1427; Curry *v.* McCanless, 307 U. S. 357, 83 L. Ed. 1339. Also see 16 C. J. S.,

sec. 602, p. 1205, stating that "a denial of due process of law results from any statute, whether state or federal, which takes away any of the essential attributes of private property, . . ." (citing Ferris *v.* Wilbur, 27 Fed. 2d 262); and C. J., secs. 486, 487, pp. 956, 957.

In United States *v.* Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045, it was said that a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth Amendment (with citations). Also see Hamilton *v.* Kentucky Distilleries & W. Co., 251 U. S. 146, 155, 64 L. Ed. 194, 199. The same rule is stated in Darlington *v.* Board of Councilmen (Ky.), 140 S. W. 2d 392, 396 (citing the Cohen case, supra), and in Henderson *v.* Bryan, 46 Fed. Supp. 682, 684, and Schatte *v.* International Alliance, etc., 70 Fed. Supp. 1008, 1010 (decided by the same court that decided the Barton case, infra).

Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming, but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of National Service Life Insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is Barton *v.* United States, 75 Fed. Supp. 703, in which a widow of a deceased veteran applied to the Administrator of Veterans' Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his decision. The Barton decision is not, of course, conclusive upon this court; and we think it is clearly distinguishable in so far as the necessities of that case were

determined. But if, as some of the language of the opinion indicates, that court decided that because of the provisions of section 454a, supra, the Congress intended to and did attempt to provide that where premiums on a National Service Life Insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of decedent may be divested of her community property right by the action of the husband in using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case.

Also see Bostrom *v.* Bostrum (N. D.), 236 N. W. 732; Lewis *v.* Lewis, 34 Cal. App. 2d 422, Baker *v.* Tulsa Building & Loan Assn. (Okla.), 66 Pac. 2d 45; Miller *v.* McKenna, 23 Cal. 2d 774, 783.

The one remaining point on this appeal is whether the trial court erred in allowing the plaintiff one-half the value of the automobile at the time it was transferred to appellants, or whether plaintiff was entitled to one-half of the $1080.00 received from sale of same after the death of Leonard Wissner. The trial court found that the value of the car at the time it was transferred to defendants was $1600.00, and awarded plaintiff judgment for one-half of the value thereof. That the said automobile was community property cannot be questioned, since it was paid for with the community earnings of the spouses after their marriage in 1930, including the earnings of plaintiff who made the final payments out of her own earnings after her husband entered the service. She testified that she did not know of the transfer until after the death of her husband, after which she made demand therefor. The trial court found that the transfer was without consideration, and the evidence sustains that finding. It might be questioned, in view of the evidence, whether the decedent ever intended to transfer the ownership of the automobile to his parents at all. However, they assert ownership, and it may be

presumed that such ownership was acquired when the car and pink slip were delivered to them, as there is nothing to show a later acquisition of title. The trial court, then, may well have concluded that it was transferred to them at that time, and when its value was $1600.00. So determining, its finding that plaintiff is entitled to one-half of its value at that time is supported by the record. Defendants knew that it was the community property of plaintiff and their son, and they may be said to have converted it to their own use at the time of the transfer. Section 3336 of the Civil Code thus became applicable as to the amount of recovery from the convertor, to wit, the value of the property at the time of conversion. And if defendants, having notice of plaintiff's rights, as they had, chose to sell the vehicle, they must respond to the owner for its value, regardless of the price at which they chose to sell it. (A. Meister & Sons Co. *v.* Harrison, 56 Cal. App. 679, 681.)

The judgment is affirmed.

Adams, P. J.

We concur:

Peek, J.; Thompson, J.

APPENDIX B

Memorandum Ruling

No. 522,648

In the Superior Court of the State of California, in and for the County of Los Angeles.

Daisy Edda Johnson, plaintiff, vs. Ada Shelton, defendant.

The controversy in this case relates to the relative rights of a widow and a mother of a deceased veteran of World War II to the monthly payments being made by the federal government under a War Service insurance policy. The widow of the veteran contends that while the policy designates the mother as the sole beneficiary, it was taken out during the deceased veteran's marriage to the widow, the

plaintiff here, and hence, under our community laws, she is entitled to reach one-half of the proceeds of the policy by making the mother a trustee thereof for the plaintiff. The mother did not answer the complaint and hence her default was duly entered. Under the law of this state the default operates as an admission by the mother of the truth of the cause of action as set up in the complaint and of every material and traversible allegation therein which is well and properly pleaded, but the default does not admit that the facts alleged are in law sufficient to constitute a good cause of action or to entitle plaintiff to the relief prayed. Moreover, where the cause of action is predicated upon a document the terms of the document control over any contrary averments set forth in the complaint.

The right of the plaintiff to recover is based upon the fact that the community funds of the decedent and the plaintiff, his widow, were used to pay the premiums on the policy issued by the federal government, and hence, under the community laws of this state, of which the decedent was a resident, one-half of the proceeds are payable to the surviving widow. This, of course, is the rule with respect to life insurance policies issued by private corporations. We turn then to consider whether the rule is the same or otherwise with respect to life insurance policies issued by the federal government.

That the rule is otherwise is the holding of Judge Mathes in Barton *v.* United States, 75 Fed. Supp. 703; that the rule is not otherwise is the holding of Presiding Justice Adams in Wissner *v.* Wissner, 89 A. C. A. 857. In view of that conflict of opinion, the question at once is presented whether the Wissner case is a controlling precedent upon this court if there are, as appears to be the case, decisions to the contrary by the Supreme Court of the United States.

In McCulloch *v.* Maryland, 4 Wheaton, 316, Chief Justice Marshall said:

". . . The People of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that questions must arise between these governments thus constituted, it became of great

moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding."

In the case before us the policy of insurance was issued by the federal government pursuant to a congressional act. To the extent then that any state law conflicts with this act of Congress it is of necessity void and of no effect. The act in question permitted a veteran to apply for a policy of insurance, but restricted his designations of beneficiaries to certain persons, among others a wife or mother. Likewise the act expressly provides that the proceeds of a policy may be paid only to the beneficiary designated in the policy and that "payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." For this court to impress a trust on the funds as they are received by the mother is to run directly into the teeth of the statute.

It is said, however, in Wissner *v.* Wissner that to deprive a widow of her vested right under state law to receive one-half the proceeds of a federal life insurance policy where the premiums are paid out of community funds is contrary to the Fifth Amendment. But this contention appears to be fully answered by Justice Holmes in speaking for the court in White *v.* U. S., 270 U. S. 175, 70 L. Ed. 530, and by Chief Justice Hughes speaking for the court in Lawrence *v.* Shaw, 300 U. S. 245, 81 L. Ed. 623, neither of which cases are cited in the Wissner case. The White case involved a federal

service insurance policy issued in 1918. Under the act under which the policy was issued a veteran could not designate an aunt along with his mother as a beneficiary as he wished to do. Accordingly, he designated his mother the beneficiary, but left a will providing that one-half of the sums paid to his mother should go to his aunt. Under the statute, as it existed at the time of the veteran's death, the provision in favor of the aunt was unenforceable. However, a year later Congress passed an act amending the statute so as to permit payments to persons in the class of aunts and additionally made the statute retroactive as of the date of the enactment of the original statute pursuant to a reservation contained in the original statute. The court held that the amendment of the statute did not violate any rights of the mother under the Fifth Amendment. The court said: "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the government to them, if not paternal, was at least avuncular . . . The only relations of contract were between the government and him. White's mother's interest at his death was vested only so far as he and the government had made it so, and was subject to any conditions upon which they might agree."

In Lawrence *v.* Shaw, *supra*, it was held that the federal government could exempt the proceeds of a veteran's policy from state taxation despite the state's laws to the contrary. That being true, it would seem to follow that state community laws cannot fare any better. Moreover, it should be observed that in the instant case the insurance premiums were paid by deducting their amount from the pay of the veteran. In one aspect such pay represents a gift by the government rather than earnings, because the government can compel any person to serve in its armed services without pay (United States *v.* Williams, 302 U. S. 46). In the Williams case the court said:

> "Enlistment is more than a contract, it effects a change of status. It operates to emancipate minors at least to the extent that by enlistment they become bound to serve subject to rules governing enlisted men and entitled to have and freely to dispose of their pay."

In view of the foregoing decisions of the United States Supreme Court it follows that judgment must be entered for the defendant.

CLARENCE M. HANSON,
Judge.

APPENDIX C

No. 6061-BH

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the District Court of the United States, in and for the Southern District of California, Central Division.

Anna M. James, plaintiff, *v.* United States of America, William H. James, William H. James and Agnes James, as custodians for Bobby Ray James, a minor, Doe One, Doe Two and Doe Three, defendants.

The above entitled cause having come on regularly for trial on the 5th day of June, 1947, before the Honorable Ben Harrison, Judge of the above entitled Court, sitting without a jury, a jury having been expressly waived by all of the parties; * * * and the Court having heard all of the testimony and having examined the documentary evidence offered by the parties, and the cause having been submitted for decision, and the Court being fully advised in the premises, hereby makes it Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds as follows:

I

The plaintiff, *Anna M. James*, is the widow of the insured soldier, *Robert L. James*. The defendant, the *United States of America* is the insurer, the defendant, *William H. James*, is the father of the deceased insured, *Agnes James* is the divorced wife of the deceased insured, *Robert L. James*, and the mother and the legal guardian of *Bobby Ray James*.

Agnes James has had her name changed to her present name, Diane C. James. That by stipulation of parties, the minor *Bobby Ray James* was made a defendant to said action.

II

That the plaintiff and the insured, Robert L. James, were married in the State of Arkansas on April 8, 1942, and that at all times thereafter until the death of the insured, they remained husband and wife.

That subsequent thereto, and on June 8, 1942, the insured Robert L. James, enlisted, or was inducted into active service of the United States Army and continued therein until his death on June 21, 1944.

That on July 8, 1942, the insured applied for and was granted a policy of United States government life insurance, No. N3-101-428 in the sum of $5,000.00, naming his principal beneficiary thereof, William H. James, described as father and as contingent beneficiary, Bobby Ray James, described as son. Said insurance contract became effective on August 1, 1942, and that the insured paid the premiums thereon by deductions from his service pay to and including the date of his death, therefore, said insurance contract was in full force and effect at said time.

That on the same day, that is to say, on July 8, 1942, the insured applied for and was granted an additional contract of National Service Life Insurance in the sum of $5,000.00, No. N3-111-499, effective August 1, 1942, naming as the principal beneficiary thereof, Anna M. James, described as wife, and as the contingent beneficiary, Bobby Ray James, described as son. That the insured paid the premiums on said policy during the period of service by deductions from his service pay to and including the date of death.

That on March 16, 1944, the insured filed a change of beneficiary on the official form provided by the War Department for that purpose, wherein he made his father, William H. James, as principal beneficiary, on a policy No. N3-101-428, and his son, Bobby Ray James, as the contingent beneficiary thereof, and on the second policy No. N3-111-499 he named as principal beneficiary, his son, Bobby Ray James,

and as contingent beneficiary, his wife, Mrs. Anna May James, the plaintiff herein; both policies were in full force and effect at the date of death. The numbers on said policies have apparently been transposed or used interchangeably, but the same does not affect them in any manner whatsoever.

That the insured was reported missing in action June 21, 1944, evidence of his death was received by the War Department and date of death was established as of June 21, 1944. See War Department Form No. 52-1, dated May 29, 1945.

* * * * * * *

IV

The Court further finds that prior to the date of decedent's marriage to the plaintiff, Anna M. James, the said decedent was, and had held his legal residence in the County of Dallas, State of Texas, and that said residence continued to be the residence of the decedent and plaintiff to the date of his death. That plaintiff is now a resident of the County of Los Angeles, State of California.

V

The Court further finds that, except as hereinafter qualified, the Community Property Laws of the State of Texas govern as to the management, control and disposition of the community property of the plaintiff and the decedent and that no fraud is alleged or proven to have been practiced either by the decedent against the plaintiff or by the plaintiff against the decedent.

VI

That the contracts of insurance sued upon herein were issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, and that the laws of the United States of America relating to such contracts of insurance are paramount in the naming of or changing of beneficiaries by an insured thereunder, and with respect to the disposition of the proceeds of said contracts of insurance, and that said National Service Life Insurance Act of

1940, as amended, and all regulations promulgated pursuant to the authority granted by said statute are not affected, modified or controlled by any state laws or regulations to the contrary.

• • • • • • •

The Court makes the following Conclusions of Law from the foregoing facts:

• • • • • • •

II

That the residence of the plaintiff and her deceased husband was, prior to his death, in the County of Dallas, State of Texas.

III

That under the contracts of insurance sued upon herein issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, the insured had the absolute right to make a designation or change of designation of beneficiary within the permitted class, without the consent of the plaintiff wife.

IV

That the right to name or change the beneficiary thus conferred by federal statute is not subject to and cannot be affected, modified or controlled by any state community property laws.

V

That the disposition of the proceeds or benefits of any contracts of insurance issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, is not subject to and cannot be controlled or governed by the community property laws of any state.

VI

That under the Community Property Laws of the State of Texas, where there is no intention on the part of the

husband to defraud a wife, the proceeds of a policy on the life of the husband vested in the beneficiary named in the policy upon the death of the insured husband even though the policy was taken out during coverture, by the husband, and the premiums were paid out of community funds.

VII

That the plaintiff is not entitled to any relief either as prayed for in the Complaint or as shown by the facts proven.

VIII

That neither the plaintiff's Complaint nor the facts proven state or prove a claim against any of the defendants herein upon which relief can be granted.

IX

That the plaintiff has no right or claim in or to either of the insurance policies sued on herein or in or to any of the proceeds thereof, save and except as the same may hereafter accrue to her as the contingent beneficiary where so named.

* * * * * * *

Dated: June 16th, 1947.

[S.] BEN HARRISON,
United States District Judge.

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In the Supreme Court

OF THE

United States.

OCTOBER TERM, ~~1948~~ 1949

No. ~~[redacted]~~ 117

LOUISE M. WISSNER and LEANDROS H. WISSNER,

Appellants,

vs.

MARGARET WISSNER,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION OF APPELLEE FOR AFFIRMATION OF JUDGMENT OF STATE COURT AND DISMISSAL OF APPEAL.

W. COBURN COOK,
Berg Building, Turlock, California.
VERNON F. GANT,
CARLOS J. BARGER,
National Bank Building, Modesto, California.
Attorneys for Appellants.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

LOUISE M. WISSNER and LEANDOUS H. WISSNER,

Appellants,

vs.

MARGARET WISSNER,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION OF APPELLEE FOR AFFIRMATION OF JUDGMENT OF STATE COURT AND DISMISSAL OF APPEAL.

At the outset it should be pointed out that the basis of this Court's jurisdiction by writ of certiorari is admitted in that the state court has decided a federal question of substance not heretofore determined by the Court.

There is a direct conflict between the state court and the Federal District Court sitting in the state

which is shown in the lower court's opinion (R. 33-4, 82-3, 89 A.C.A. 867-8, 201 Pac. (2d) 844) and is admitted by appellee both in his typewritten statement page 22, and Exhibit A of said statement.

Appellee seeks to deny the jurisdiction of this Court by appeal by claiming that the provisions of the federal statute relied on by appellants are not applicable. The lower court refused to follow appellee in this contention and not being able to avoid the clear meaning of the provisions of the federal statute the lower court held that they were unconstitutional under the Tenth Amendment and the due process clause of the Fifth Amendment of the United States Constitution.

Since appellee has not urged any ground for a dismissal of the appeal and an affirmance of the lower court's judgment short of a presentation of the case on the merits, it will be necessary for us to present the case on the merits to completely answer the motion.

SHORT STATEMENT OF FACTS AND ISSUES.

The case arises on a complaint of the plaintiff appellee to recover one-half the proceeds of a National Service Life Insurance policy from designated beneficiaries. Plaintiff's claim is based on the community property laws of the State of California, it being admitted that at all times during the marriage of plaintiff-appellee and her husband, Dr. Leonard O. Wissner that they were residents of the State of California and his salary under the laws of the State of Cali-

fornia was community property. Defendants-appellants are the mother and father of Dr. Wissner and are named the beneficiaries of his National Service Life Insurance policy. Under the laws of the State of California if this were a private insurance policy, the wife would be entitled to one-half of the proceeds, but defendants-appellants are receiving the proceeds of the policy from the Veterans Administration since they were the named beneficiaries of the policy and they claim the right to retain the proceeds received under the provisions of Section 3, 49 Statutes 609, 38 U.S.C.A. Section 454a Act of August 12, 1935, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

The lower court held that the United States did not have the power to provide that payments of the proceeds of a National Service Life Insurance policy shall be exempt from the claims of the widow of the deceased assured based on the state community property laws (R. 31 and 79, 89 ACA 865, 201 Pac. (2d) 843) and awarded a judgment in favor of the widow and against the parents for one-half the payments received and to be received and gave the parents five days to remit after receipt. (R. 21, 31 and 80, 89 A.C.A. 865, 201 Pac. (2d) 843.)

Appellee in her motion to dismiss the appeal and affirm the judgment has not argued the question of power under the Tenth and Fifth Amendments and has repudiated the basis of the lower court's decision that the provisions of the federal act relied on by appellants is beyond the power of Congress under the Tenth and Fifth Amendments. (Point III Appellee's Statement p. 7.)

APPELLANTS CONTEND:

That among the powers expressly delegated to the Congress in Article I, Section 8 of the United States Constitution are the powers to "provide for the common defense and general welfare of the United States", to "raise and support armies", to "provide and maintain a Navy", to "make rules and regulations for the government and regulation of the land and naval forces", and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers".

That in the exercise of these powers the Congress has passed the "National Service Life Insurance Act" and the provisions of that Act, as amended, govern the designation of beneficiaries, the payment of insurance proceeds and the named beneficiaries' rights in the proceeds and being the supreme law of the land are not subject to and may not be controlled, modified or changed by the community property laws of the State of California.

Specifically we contend that the provisions of the federal act:

> "Payments made to * * * a beneficiary * * * shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever * * *."

are a complete bar to appellee's claimed rights and require a reversal of the judgment of the lower court.

APPELLEE CONTENDS:

I.

That since appellants base their defense on the words of the federal statute "*AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever" that if any Court has touched payments made under veterans insurance either before or after receipt by the beneficiary by any process of any kind or character whatsoever that there is no federal question involved. (Statement p. 8, line 23, p. 9, line 8.)

II.

That the words "*AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary" are only intended to apply to creditors and that a wife seeking to enforce her vested rights in community property is not a creditor. (Appellee's typewritten Statement, pp. 13-14; p. 10, lines 4-6; p. 11, lines 11 to 12, line 3; p. 17, lines 10-13.)

III.

That community property laws have been applied to determine rights in the proceeds of a National Ser-

vice Life Insurance policy. (Appellee's typewritten Statement Point VI.)

IV.

That it is not "necessary and proper" in carrying out the intention of Congress to extend the language of the statute to defeat vested rights of a wife in community property. (Exhibit "A" pp. 7, 8, 17, 26, 31.)

V.

That the jurisdiction of federal district courts conferred by Section 617 of the National Service Life Insurance Act of 1940 as amended (38 U.S.C. Section 817) incorporating by reference Section 19 of the World War Veterans Act as amended (38 U.S.C. Section 455) indicates the intention of Congress to provide only for the litigation of disagreements as to whom the United States should make payments and that the federal cases construing the act are, therefore, not in point in a controversy between claimants of the proceeds of an insurance policy in an action in which the United States is not a party. (Appellee's typewritten Statement p. 5, lines 4-6, Exhibit "A".)

We shall attempt to answer appellee's contentions point by point and page by page and also the contention of the lower court that the case of *Cook v. Cook*, 65 Cal. App. (2d) 260, is authority for the lower court's holding.

OUR AFFIRMATIVE POSITION.

CONGRESS HAS THE POWER TO PROVIDE INSURANCE FOR THE MEMBERS OF THE ARMED FORCES AND THE FEDERAL ACT SHOWS THE INTENTION TO CREATE A COMPLETE AND UNIFORM SYSTEM.

This Court has said "If the act is within the power confided to Congress the Tenth Amendment by its terms has no application since it only reserves to the United States powers not delegated to the United States by the Constitution." *Everard's Breweries v. Day*, 265 U.S. 545, 558.

The United States Constitution, Article I, Section 8, grants to Congress the power to provide for the common defense and general welfare of the United States, to raise and support Armies, to provide and maintain a Navy, to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

In the exercise of these granted powers the Congress has passed the World War Veterans Act and the National Service Life Insurance Act which together show an intention by the Congress to provide a complete and uniform system of insurance for all members of the armed forces. As a part of this system it is provided that the insured shall have the right to name the beneficiaries and to change them at will;[1] that payments will be made to named beneficiaries

[1]Act of Oct. 8, 1940, Chapter 757, 54 Stat. 1009, as amended (38 U.S.C.A. Sec. 802-g), Appendix page viii.

only during the life of said beneficiaries;[2] that should no beneficiary be named that the proceeds of the insurance shall be paid to the estate of the deceased veteran[3] and that "payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".[4]

Other provisions of the National Service Life Insurance Act indicating a Congressional intent to provide a completely integrated Federal plan of insurance for members of the armed forces, to be administered on a National scale free from State jurisdiction or control, are (1) the provisions directing the Administrator of Veterans' Affairs to administer the Act and conferring authority to promulgate regulations for that purpose;[5] (2) the provision that the United States should bear the costs of administration;[6] (3) the provision that the United States should bear excess mortality costs and cost of waiver of premiums due to the extra hazards of military or naval service;[7] (4) the provision for a National Ser-

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[2]Sec. 602 I (38 U.S.C.A. Sec. 802 i), Appendix page xi.

[3]Sec. 602 J (38 U.S.C.A. Sec. 802 j), Appendix page xii.

[4]Act of August 12, 1936, Chap. 510, Sec. 3, 49 Stat. 609 as amended (38 U.S.C.A. Sec. 454a), Appendix page v.

[5]Sec. 608 (38 U.S.C.A. Sec. 808), Appendix page xvi.

[6]Sec. 606 (38 U.S.C.A. Sec. 806), Appendix page xiv.

[7]Sec. 607 (38 U.S.C.A. Sec. 807), Appendix page xiv.

vice Life Insurance appropriation for the payment of liabilities[8] and (5) the provisions for the creation in the Treasury Department of the National Service Life Insurance Trust fund and the setting aside of reserves to meet all liabilities.[9]

NATIONAL SERVICE LIFE INSURANCE CONTRACTS BEING AUTHORIZED BY ACT OF CONGRESS AND BEING CONTRACTS OF THE UNITED STATES ARE NOT SUBJECT TO STATE CONTROL

National Service Life Insurance contracts were authorized by the National Service Life Insurance Act, passed by Congress on October 8, 1940 (38 U.S.C.A., Sec. 801); the provisions of that Act, as amended, govern the designation of beneficiaries and payment of insurance proceeds thereunder, and are not subject to and may not be controlled, modified or changed by the community property laws of the State of California. *Barton v. United States*, 75 Fed. Supp. 703 (S.D. Calif.); *Johnson v. Shelton*, Memorandum Ruling No. 522,648 (Superior Court of State of California, County of Los Angeles) (Appendix pp. 16-20 Statement as to Jurisdiction). In the *Barton* case, the Court said (pp. 705, 706):

> "Whether state law can control disposition of proceeds of policies issued pursuant to the National Service Life Insurance Act of 1940, 38 U.S.C.A., Secs. 801-818, depends upon the intent of Congress; for it is clear that the Act, being a

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[8]Sec. 604 (38 U.S.C.A. Sec. 804), Appendix page xiii.
[9]Sec. 605 (38 U.S.C.A. Sec. 805), Appendix page xiii.

constitutional exercise of powers granted to Congress, * * * is "Supreme Law of the Land" * * * if Congress so willed. * * *

* * * * * * *

"I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A., Secs. 801-818. It follows then that California's community property law, (Cal. Civ. Code, Sec. 164), can confer no right on plaintiff to share in the proceeds of the policy at bar.

"My learned colleague Judge Harrison so held with respect to the community property law of Texas in James v. United States, et al., D.C., S.D. Cal. 1947. (Appendix C pp. 20-24 Statement as to Jurisdiction.)"

Also, as stated in *Johnson v. Shelton*, supra:

"In the case before us the policy of insurance was issued by the Federal Government pursuant to a Congressional act. To the extent then that any State law conflicts with this act of Congress it is of necessity void and of no effect. * * *"

Similar rulings have been rendered without opinions by United States District Judge Ben Harrison, in *James v. United States, et al.* No. 6061-BH, on June 16, 1947, (Appendix C pp. 20-24 Statement as to Jurisdiction) and also in *Pack v. Pack*, No. 7651 BH; by Judge Campbell E. Beaumont in *Rhodes v. United States, et al.* No. 5845-B, and by Judge Jacob Weinberger, in *Hayek v. Hayek v. United States*, No. 7400-W, all decided in the District Court of the

United States for the Southern District of California; and by the Superior Court of the State of California in and for the County of Los Angeles, in *Nobles v. Cannell*, No. 502-587 (Appendix p. xxiii herein). There are no Federal Court decisions to the contrary of which we are aware.

Government insurance contracts are contracts of the United States *(Lynch v. United States*, 292 U.S. 571), and their construction presents questions of Federal law not controlled by the law of any State. *Woodward v. United States*, 167 F. (2d) 774 (C.C.A. 8th); *Cassarello v. United States*, 271 Fed. 486 (M. D. Pa.), affirmed, 279 Fed. 396 (C.C.A. 3d); *United States v. County of Allegheny*, 322 U.S. 174, 183; *Clearfield Trust Co. v. United States*, 318 U.S. 363. As stated in *Woodward v. United States*, 167 Fed. (2d) 774:

> "Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts. Lynch v. United States, 292 U.S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434. The validity and construction of such policies present questions of federal law. Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 S. Ct. 573, 87 L. Ed. 838; United States v. County of Allegheny, 322 U.S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209."

See also dicta in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 79.

FEDERAL LAW CONTROLS PAYMENT OF THE PROCEEDS OF A NATIONAL SERVICE LIFE INSURANCE POLICY.

Under the provisions of Section 602 (g) (38 U.S. C.A., Sec. 802 (g), the insured had the right to designate the beneficiary of his National Service Life Insurance contract within a restricted class of beneficiaries, and the right to change the beneficiary, without the beneficiary's consent. The section reads as follows:

> "(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: * * *"

This was one of the important provisions of the contract[10] which the insured entered into with the United States when he applied for National Service Life Insurance, and without any change having been made during his lifetime controls the payment of insurance benefits.

Under Government insurance contracts, the only relations of contract are between the Government and the insured, the beneficiary being a volunteer. *White*

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[10]The contract provisions are found in the Act, the amendments thereto and the regulations promulgated thereunder. *White v. United States*, 270 U. S. 175; *Lynch v. United States*, 292 U. S. 571; *Wilner v. United States*, 292 U. S. 571.

v. United States, 270 U.S. 175 supra; *Von Der Lippi-Lipski v. United States*, 4 F. (2d) 168 (App. D.C.) infra; *United States v. Sterling*, 12 F. (2d) 921 (C.C.A. 2) infra. As stated in *White v. United States*, supra (pp. 180-181):

> "The only relations of contract were between the Government and him. White's mother's interest at his death *was vested* only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more. See Helmholz v. United States, 294 Fed. 422, affirming 290 Fed. 614. (Emphasis ours.)

Appellee, who admittedly was not designated as beneficiary, had no relations of contract with the Government and could occupy no better position than the named beneficiary.

So in *Washburn v. United States*, 63 Fed. Supp. 224 where the proceeds were payable to the wife as primary beneficiary and the sister of the insured as contingent beneficiary and the wife died leaving a son shortly after the insured died the Court said:

> "It will not be disputed, I am sure, that it is a well established principle of law that where a beneficiary survives the insured, however short the length of time may be between the death of the insured and that of the beneficiary, the rights of a 'contingent' beneficiary are lost, and that upon the death of the insured, the benefits immediately become due to the surviving principal beneficiary. (Citing cases.)

"With that principle of law in mind, if the facts in this case had arisen under an ordinary life insurance policy, there could be no question but that immediately upon the death of the insured, the right to the insurance would have vested in the 'principal' beneficiary, his wife, and that the 'contingent' beneficiary would have acquired no interest in the benefits, *but in this case the insurance was provided for by a special Act of Congress, for those in the Armed Forces, and we must find the answers to our questions within the Act itself.*" (Italics ours.)

The Court then holds that the sister, the "contingent" beneficiary, is entitled to the insurance in spite of the state rule of law to the contrary.

Similarly a state court consent decree is invalid as a violation of the federal act prohibiting assignments *Robertson v. McSpadden,* 46 Fed. (2d) 702. An agreement to divide the proceeds is invalid. *Bradley v. United States,* 43 Fed. (2d) 573. An agreement not to change beneficiaries is invalid. *Von Der Lippi-Lipski v. United States,* 4 Fed. (2d) 168; *Lewis v. United States,* 56 Fed. (2d) 563; *Murphy v. United States,* 5 Fed. Supp. 583, where the Court said:

"(3) Plaintiff's second ground of recovery appears to resolve itself into a *pure question of law.* He testified that, after his son's term insurance had expired for the non-payment of premiums, he furnished money for it to be reinstated, and that he had paid the premiums on the life insurance policy since it was issued. There is conflicting testimony as to whether or not such was the fact. It is not necessary for me to make a finding one

way or the other in order to determine plaintiff's right in this case. Whether or not the father may *prove a claim against his son's estate* for money so expended is a question for the state Court. *An agreement not to change beneficiary in a war risk policy in consideration of money advanced to insured by beneficiary is invalid.*"

A gift of the policy followed by payment of the premiums by the donee does not prevent a change in beneficiary by the insured and the new beneficiary is entitled to the proceeds as against the donee. *United States v. Sterling,* 12 Fed. (2d) 921; *Tompkins v. Tompkins,* 132 N.J.L. 217, 38 Atl. (2d) 890.

FEDERAL LAW PROTECTS THE NAMED BENEFICIARY IN THE USE OF THE PROCEEDS ALTHOUGH STATE RULES OF LAW WOULD AUTHORIZE OTHERS TO TAKE THE PROCEEDS FROM THE NAMED BENEFICIARY.

The provisions of the federal act directly involved in this case are found in Section 3, 49 Statutes 609, 38 U.S.C.A., Section 454 A, Act of August 12, 1934, Chapter 510:

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, AND shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".

The provisions of this section against assignments have been upheld in *Robertson v. McSpadden*, supra; *Bradley v. United States*, supra; *Von Der Lippi-Lipski v. United States*, supra; *Lewis v. United States*, supra; *Murphy v. United States*, supra; *United States v. Sterling*, supra; *Tompkins v. Tompkins*, supra.

The provisions of this section exempting the proceeds from taxation were upheld in *Lawrence v. Shaw*, 300 U.S. 245 and considered not applicable to the situation presented in *United States Trust Co. of New York v. Helvering*, 307 U.S. 57.

The exception from the claims of creditors was followed in *Culp v. Webster*, 25 Cal. App. (2d) Supp. 759, 70 P. (2d) 273. In *Pagel v. Pagel*, 291 U.S. 473 it was held under the previous wording of this section that this exemption did not extend to the funds after they became a part of the estate of the assured and the Congress immediately thereafter broadened the language to cover that situation. *In re McCormick's Estate*, 8 N.Y.S. (2d) 179, 185-188, *Haley v. United States*, 46 F. Supp. 4, 7.

As Appellee points out in her Statement, lower courts have applied proceeds to the payment of claims for alimony, *Hannah v. Hannah*, 11 S.E. (2d) 779, 781, and *Stirgus v. Stirgus*, 160 S. 285 and have approved similar payments made by a guardian of a veteran unable to act for himself, *Gaskins v. Security Bank*, 30 Cal. App. (2d) 409, 85 Pac. (2d) 681, 685, *Guardianship of Giambastini*, 1 Cal. App. (2d) 639, 37 Pac. (2d) 142, *In re Flanagan*, 31 Fed. Supp. 402.

There are decisions contra e.g. *Brewer v. Brewer*, 19 Tenn. App. 209, 84 S.W. (2d) 1022, *Maddox v. Elliott*, 248 Ala. 271, 27 So. (2d) 498, 499, *Riker v. Riker*, 160 Misc. 117, 289 N.Y.S. 835 decided under the similar wording of the Act of Jan. 27, 1936, c. 32, Sec. 4, 49 Stat. 1101 (38 U.S.C.A. 686 c) (Appendix page vii).

In whatever manner this Court may resolve this conflict when the question is presented, as it undoubtedly will be at some time, it is not necessary to resolve it in the case at bar. We are concerned with the right of the insured to name the beneficiary in the policy on his life and of that beneficiary's right to retain the proceeds paid to her. The question of support for a wife or children is not involved.

Cases "on all fours" with the case at bar except that rights in community property are not involved are *United States v. Sterling*, 12 Fed. (2d) 921 (supra) and *Tompkins v. Tompkins*, 132 N.J.L. 217, 38 Atl. (2d) 890 (supra). The opinions are short—please read them.

In addition there is the unbroken line of cases decided by the federal district courts in California and the case of *Johnson v. Shelton* decided by Judge Clarence M. Hanson of the Superior Court of the City and County of Los Angeles since the publishing of the opinion of the lower court in the present case. (Pages 17-18 Statement as to Jurisdiction and pages 9-10, 22 and 30 herein.) And the case of *Nobles v. Cannell*, supra (Appendix page xxiii.)

OUR POINT BY POINT AND PAGE BY PAGE ANSWER TO APPELLEE'S CONTENTIONS.

THIS COURT HAS JURISDICTION BY APPEAL BECAUSE APPELLANTS BASED THEIR DEFENSE ON THE PROVISIONS OF A FEDERAL STATUTE WHICH THE LOWER COURT REFUSED TO APPLY ON THE GROUND THAT THEY WERE UNCONSTITUTIONAL.

We agree with appellee that there is no federal question involved if Section 3, 49 Statute 609, 38 U.S. C.A., Sec. 454a, Act of August 12, 1935, Chapter 510 is not applicable. The lower court held that the federal government *did not have the power* to provide that payments made to a beneficiary of a National Service Life Insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of the State of California to one half of the payments *after* their receipt by the mother of the insured. (R. 31 and 79, 89 ACA 865, 201 Pac. (2d) 843.)

The act provides:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of a beneficiary under any of the laws relating to veterans shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." (Emphasis ours.)

The intent of the Congress in using this language if it is not clear will be derived from the rest of the statutes on this subject and the history of the statute.

In other parts of the statute the insured is given the right to name the beneficiaries and to change them

at will within certain classes. Following the case of *Pagel v. Pagel*, 291 U.S. 473, a further extension of the exemptions was made to include the estate of the insured. The clear intention of the Congress was to give the insured the right to say who should receive the proceeds of his insurance and to protect that person in the use of the proceeds against any possible claim.

Under the well known rule of statutory construction every word and phrase must be given some useful meaning if that is possible. When the statute says that "payments made to a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, *AND* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever", the words "*AND* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever" add new exemptions to the exemptions from taxation and the claims of creditors already stated.

Congress intended a veteran to have the right to say to whom the proceeds of his insurance should be paid and that that person should be able to use those proceeds free from taxation, free from the claims of creditors *AND* free from the claims of any other person such as a wife he may have already fully provided for.

The only claims that could be made against proceeds of an insurance policy are claims of the state by taxation, claims of creditors AND claims of relative by blood or marriage. The Congress said that none of

these claims could be asserted either before or *after* receipt of the payments by the beneficiary.

Appellee in her Memorandum of Respondent's Oral Argument, Exhibit A, to her Statement, pages 13 and 33, contended that there was no actual conflict between provisions of the federal act and the state statute. Mrs. Justice Adams speaking for the Court below repudiated this contention and in upholding the California community property law held the provisions of the federal statute unconstitutional. She would not have done this if the meaning of the federal act was not clear and clearly in conflict with the state statute.

Appellee contends (pages 8 and 9 of her statement) that there is no federal question involved unless appellant can show that the provisions of the federal statute "mean that no Court can touch payments made under veterans' insurance either before or after receipt by the beneficiary by any process of any kind or character whatsoever." Having set up this straw man she proceeds to knock it down.

All appellants must show, of course, is that the federal statute was intended to protect them and that the lower court has refused to apply it. The lower court not only refused to apply it in accordance with its clear terms but said the provisions relied upon were unconstitutional. Such a holding gives this Court jurisdiction by appeal under the provisions of Title 28 United States Code, Section 1257 (1).

> "Final judgments or decrees rendered by the highest court of a state in which a decision could

be had may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity."

Appellee insists on pages 15 et seq. of her typewritten statement that this Court limits the provisions of section 454a in the case of *United States Trust Company of New York v. Helvering*, 307 U.S. 57, supra, when she is still in the process of knocking down the straw man that she has set up—the argument that there is no federal question involved if any Court at any time has held that payments made under veteran's insurance can be touched by any process of any kind or character whatsoever. She then on page 21 of her typewritten statement in discussing the case of *Lawrence v. Shaw*, 300 U.S. 245 fails "to see that this case applies to any of the present issues."

Both cases concern themselves with the exemption in the statute relied upon by appellants which apply to taxation. In the *Helvering* case this Court held that the $10,000.00 of federal life insurance should be counted in determining the federal estate tax. This was based on the well established principle that the federal estate tax is on the transfer and not on the property.

In *Lawrence v. Shaw*, 300 U.S. 245, Chief Justice Hughes applied the provisions of the federal act on which appellants rely and held that North Carolina could not tax the proceeds of a government life insurance policy even after the checks had been collected

and the proceeds deposited in a bank by the guardian of a veteran.

Lawrence v. Shaw was cited to the state courts for the proposition that federal rules of law control and must be applied in their field and not state rules in conflict therewith.

It was further cited on the proposition that the constitutionality of the very section of the statute relied upon by appellants had been upheld although in conflict with a statute tax statute. The *Lawrence* case is relied on in *Barton v. United States,* 75 Fed. Supp. 703, supra, and *Johnson v. Shelton* (R. 85-89), supra, both of which were cited to state courts. In spite of appellee's statement we believe that both of these cases are correct expositions of the statute upon which we rely and that both cases must be considered in determining the meaning of Section 454a and its application to the case at bar.

Is our case more analogous to the *Helvering* case involving another federal statute or more analogous to the *Lawrence* case involving a state statute? When this Court finds a conflict between two federal statutes it can resolve that conflict and determine the intent of the Congress by applying the doctrine of repeal by implication or the doctrine of general or specific laws, or some other rule of construction. When there is a conflict between state and federal statutes the state statute must fall because of the supremacy clause of the United States Constitution.

When this Court in the *Helvering* case says 454a does not prevent the taxing of a transfer it is con-

struing the provisions of the taxing statute and the exemption statute and finding no conflict. In the *Lawrence* case it finds a direct conflict and upholds the exemption statute. The lower court in the case at bar construes the exemption statute and the state statutes as being in direct conflict and says that the federal exemption statute is unconstitutional. *Lawrence v. Shaw* is therefore directly in point and appellee's failure to see its applicability is an example of extreme myopia.

A WIFE SEEKING ALIMONY OR SUPPORT FOR THE CHILDREN MAY NOT BE A CREDITOR BUT A WIFE SEEKING ONE-HALF THE PROCEEDS OF A NATIONAL SERVICE LIFE INSURANCE POLICY FROM A DESIGNATED BENEFICIARY AFTER HER HUSBAND'S DEATH IS BARRED BY THE PROVISIONS OF THE FEDERAL STATUTE.

As an original proposition and in the absence of a decision by this Court, and there is none, we would argue that the provisions of the act relied upon by appellants would exempt payments made to a beneficiary from claims for support money, alimony and child care. We would argue that *Hannah v. Hannah,* 11 S.E. (2d) 779, 781, supra, and *Stirgus v. Stirgus,* 160 S. 285, supra, are incorrectly decided. Compare *United States v. Sterling,* 12 Fed. (2d) 921, supra, *and Tompkins v. Tompkins,* 132 N.J.L. 217, 38 Atl. (2d) 890, supra, which are much closer analogies to the case at bar.

The cases of *Gaskins v. Security Bank,* 30 C.A. (2d) 409, 85 Pac. (2d) 681, 685, supra, *In re Flanagan,* 31

Fed. Sup. 402, supra and *Guardianship of Giambastioni*, 1 Cal. App. (2d) 639 (37 Pac. (2d) 142), supra, all involve payments made on behalf of a veteran incapable of acting for himself. The Courts in these cases would be justified in assuming that the veteran, were he in possession of his faculties, would have made these payments himself. The veteran in our case was in possession of his faculties. He knew that his wife was provided for even better than he desired and he wanted his parents to receive the proceeds of his insurance policy. Instead of carrying out the veteran's wishes and the plain terms of his contract with the United States, the lower court is making them a mockery.

The case of *Schlaefer v. Schlaefer*, 112 Fed. (2d) 177 is an excellent illustration of the difference in statutes that are almost alike. It appeared that the defendant navy officer was receiving disability payments from the United States. He was also receiving disability payments from a private insurance company. The act exempting payments made by the private insurance company exempted them *from the payment of any debt or liability*. Judge Rutledge said: "The obligation on which appellant's claim is based is not a 'debt' or a 'liability' in the ordinary usages of those terms. It is a duty of higher obligation." As has been said, it is not one within the usual purposes of exemption statutes.

The payments made to the defendant, Schlaefer, by the United States were not involved. It may have been that they were not attached because the statute applying to them provided:

> "Payments made to, or on account of a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, AND shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

The exemptions of the federal act applying to payments by the United States are so much broader than the exemptions applying to payments by private insurance companies that it is far from certain that a similar result would be reached by Justice Rutledge in a case involving alimony payments and even if the result would be the same in such a case it would not be determinative of the case at bar. We are determining the right of a deceased veteran to leave the proceeds of his insurance to his mother rather than to his widow who has already received half of his estate and property left in joint tenancy.[11]

Appellee did not attempt to reach the proceeds under any theory of need. She claimed a vested right in one half the proceeds. (Appellee's Statement pp. 13-15, 17.) The lower court (R. 29, 77, 89 A.C.A. 863, 201 Pac. (2d) 842) refers to the wife's rights to the earnings of her husband during marriage as vested

[11]The trial court held that this was immaterial and refused to permit the introduction of this evidence. No assignment of error was made on this point and the record on it is not presented because the alimony and child support cases were never referred to by either side or by any state court at any stage of the proceedings below. We do not believe that the Congress intended that the right of a veteran to name his mother beneficiary of his insurance policy should or can be affected in any way by the question of whether or not he will thereby leave his widow in comfortable or necessitous circumstances.

rights. This Court speaking through Justice Holmes in *White v. United States*, 270 U.S. 175, 180, supra, said:

> "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the government at considerable cost to itself, for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the government's hands to that extent no one else could complain. The only relations of contract were between the government and him. White's mother's interest at his death was vested only so far as he and the government had made it so, and was subject to any conditions upon which they might agree."

In *Von Der Lippi-Lipski v. U. S.*, 4 Fed. (2d) 168 supra, the Court said:

> "It has been held repeatedly that a beneficiary under such a contract of insurance did not have a vested interest in installments of insurance not accrued, and that such contract is not an ordinary contract of insurance, nor is it in the nature of a pension, but is rather of the character and nature of both. *It has also been held that the authority of the insured, expressly conferred by statute, to designate whomsoever he desired, within the permitted class, as beneficiary under such con-*

tract of insurance was effective, when exercised by the insured, as against those who would otherwise have been entitled to benefits thereunder." (Italics ours.)

In *Sizemore v. Sizemore's Guardian*, 222 Ky. 713, 2 S.W. (2d) 395, the Court said:

(2) "It is insisted upon this appeal that the amendment to the statute after the death of the soldier violated the Fifth Amendment to the Constitution of the United States, in that it deprived appellant of her property without due process of law. The argument proceeds upon the theory that the designated beneficiary had a vested right to all of the insurance, which could not be affected by later legislation. The argument is unsound. The beneficiary has no vested right in the installments not due or paid. His right to receive further installments ended at the death of the beneficiary, and *Congress possessed the power to provide where the insurance money should go in every contingency. The interest of the beneficiary was vested only so far as the soldier and the government had made it so, and was subject to any conditions, upon which they might agree. Congress, in creating the right, could annex conditions, and the beneficiary took the right subject to the conditions.* White v. U. S., 270 U.S. 175, 46 S.Ct. 274, 70 L. Ed. 530 annotated; Helmholz v. Horst (C.C.A.), 294 F. 417; Cassarello v. U. S. (D.C.), 271 F. 486, affirmed (C.C.A.) 279 F. 396; Gilman v. U. S. (D.C.), 300 F. 764, affirmed (C.C.A.) 300 F. 767; Sutton's Ex'r. v. Barr's Adm'r, 219 Ky. 543, 293 S.W. 1075." (Italics ours.)

In *United States v. Sterling,* 12 Fed. (2d) 921, supra, the wife paid all the premiums after a gift of the policy to her by her husband. He made a false affidavit that the policy was lost, designated new beneficiaries, his parents, and the new beneficiaries are held to be entitled to the proceeds. A similar case is *Tompkins v. Tompkins,* 132 N.J.L. 217, 38 Atl. (2d) 890 supra.

If these claimed vested rights illustrated by the last five cited cases, must fade as a snowball under a July sun when the provisions of the federal act are applied, what does it avail to call the rights of a wife in the earnings of her husband a vested right? How can they withstand the intent of the deceased soldier and the compact between that soldier and his government? To paraphrase the wording of Chief Justice Holmes in *White v. United States,* supra: Major Wissner and his government had made a contract which cut his wife's rights down to nothing. The Congress which has been given the power to "provide for the common defense and general welfare of the United States", to "raise and support Armies", to "Provide and maintain a Navy", to make rules and regulations for the government and regulation of the land and naval forces, and to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers", intended to give to Major Wissner the right to designate who should receive the proceeds of his insurance and to insure the beneficiary so designated the right to use the proceeds without interference. Major Wissner

has expressed his intention that his mother and father should receive and use these proceeds to the complete exclusion of his widow. His government has contracted to carry out the Major's wishes. The contract is expressed in an act of the Congress which is the supreme law of the land and the judges in every state, including California, are bound thereby.

NO REPORTED CASE AGREES WITH THE COURT BELOW IN HOLDING THAT STATE COMMUNITY PROPERTY LAWS CAN BE APPLIED WHEN IN CONFLICT WITH THE PROVISIONS OF THE FEDERAL STATUTE.

So far as we are informed the first case "on all fours" with the case at bar is the case of *Cora Belle Bennett v. Modesta Lee Bennett,* No. 503386, Los Angeles Superior Court. In this case Judge Myron Westover on March 20, 1946, held that the wife was entitled to recover her community half of the proceeds of an insurance policy on her deceased husband's life from her mother-in-law, the named beneficiary. This case was followed on the trial by Judge B. C. Hawkins in the case at bar.

Before the case at bar had been argued before the District Court of Appeal, Third Appellate District, Judge Harrison in the Federal District Court for the Southern District of California in the case of *James v. United States et al.,* No. 6061-B H findings and conclusions printed as Appendix C to our Statement as to Jurisdiction (R. 89-93) and Judge Mathes in *Barton v. United States,* No. 5527-WM (S.C.Dal.)

75 Fed. Supp. 703 had both held to the contrary. Mrs. Justice Adams in the case at bar expressly disagreed with the *Barton* case. (R. 33-34, 82-83, 89 A.C.A. 867-8, 201 Pac. (2d) 844.) In the meantime on May 31, 1946, Judge Ben V. Curler, of the Los Angeles Superior Court in *Nobles v. Cannell,* No. 502587 had held that the wife was entitled to recover her community half of the payments under the policy from the beneficiary and on October 27, 1948, reversed himself and held that the provisions of the federal act controlled. (R. 68-69 and Appendix page xxii herein.)

Following the publishing of the opinion in the instant case Judge Clarence M. Hanson of the Los Angeles Superior Court in *Johnson v. Shelton,* No. 522,648 expressly disagreed with the opinion of Mrs. Justice Adams speaking for the Court in the case at bar. (R. 85-89.) New cases are being filed and the state Courts are in hopeless confusion. The judges in the federal district courts have without exception, however, held that the provisions of the federal statute relied on by appellants are controlling and the state statutes in conflict therewith are inapplicable.

The cases of *United States v. Robinson,* 40 Fed. (2d) 14, *Succession of Lynch v. United States,* 17 Fed. Supp. 674; *United States v. Primilton,* 76 Fed. (2d) 555; *United States v. Rose,* 57 S.W. (2d) 350 and *Succession of Jones* (La.), 169 S. 440 relied upon by appellee have no bearing on the problem involved in our case. They all discuss the question involved in *Singleton v. Cheek,* 284 U.S. 493.

When the federal act says that in the absence of a designation of a beneficiary that the proceeds of a deceased soldier's insurance shall be paid into his estate to be distributed as the personal property of the assured,[12] of course, the state laws applying to community property can be applied. There is no conflict between the provisions of the federal statute and the state rules of descent and distribution. The federal act says that the proceeds shall be paid into the veteran's estate and leaves its further distribution open. This requires further distribution to be determined by the state rules.

In the instant case the deceased soldier has designated a beneficiary and the federal act says that the proceeds in the beneficiary's hands shall not be touched by any legal or equitable process whatever. In the cases cited by appellee the state rules of law are applied to a situation not covered by federal rules and after the federal rules in regard to payment have been fully complied with. In the instant case it is sought to apply state rules in direct conflict with the federal rules and to a situation expressly covered by the federal rules. The federal rules being the supreme law of the land the state rules in conflict therewith are void.

Appellee on pages 21 and 22 of her typewritten statement in her discussion of *Lewis v. United States*, 56 Fed. (2d) 563 (supra), and *United States v. Sterling*, 12 Fed. (2d) 92 (supra) and her statement that

[12]Act of June 7, 1924, Chapter 320, Sec. 303, 43 Stat. 625, as amended, 38 U.S.C.A. Sec. 514, Appendix page vi.

we have cited approximately fifty cases without discussing any of them and that she analyzed them when they were cited to the California Courts and is convinced that they are lacking in discussion of the one principal point involved in this matter and that the United States is not a party to this action and that this court should leave controversies of this type to state courts (p. 25) is trying to avoid a decision by this Court which she knows must result in a reversal of the judgment of the lower court. It will be a decision on a novel question so far as this Court is concerned, in a matter of great importance to veterans of the eleven community property states.

In the state courts we analyzed and discussed, among others, twenty-two of the cases cited to this Court in our Statement as to Jurisdiction. The lower court brushed our arguments aside in the following language:

> "Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming, but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of National Service Life Insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is Barton v. United States, D.C., 75 F. Supp. 702, in which a widow of a deceased veteran applied to the Administrator of Veterans'

Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his decision. The Barton decision is not, of course, conclusive upon this Court; and we think it is clearly distinguishable in so far as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that Court decided that because of the provisions of section 454a, supra, the Congress intended to and did attempt to provide that where premiums on a National Service Life Insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of decedent may be divested of her community property right by the action of the husband in using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case." (R. 33-34, and 82-83, 89 A.C.A. (2d) 867-8, 201 Pac. (2d) 844.)

The *Barton* case was the only one "on all fours" that had been reported at that time and the only reasons stated by the Court below for not following it were: (1) That the decision of the federal court was not conclusive on the state court and (2) The *Barton* case was decided by the federal court after a claim had been presented to the Administrator of Veterans' Affairs who had pursuant to the terms of the contract properly disallowed it.

At the hearing in the lower court counsel for appellee devoted his entire attention to the *Barton* case and by permission of the Court reiterated his argument and filed it in written form Exhibit "A" of appellee's typewritten statement after the argument.

This Memorandum was so successful when used twice before the same Court below that appellee confidently expects the same result in this Court by reiteration of his same arguments. The Court below, however, repudiated appellee's main contentions and decided the case on a different basis and on the authority of cases not cited by appellee nor cited in cases cited by either side.

Before discussing appellee's Exhibit "A" or the lower court's opinion further we refer to the case of *Lewis v. United States,* 56 Fed. (2d) 563. We cited this case in our Statement as to Jurisdiction as an example of a case involving the proceeds of government insurance where the Court applied the rules of the federal statute rather than state rules in conflict therewith. Appellee on page 21 of her typewritten statement says that the Court applied local law. The

fact is that the Court applied local law to determine the questions stated by appellee. There was no federal rule in conflict with local law on those matters. The first question passed on by the Court, however, was the effect of a claimed agreement by the insured not to change the beneficiary and the fact that a consideration had been given by the first named beneficiary, the insured's aunt, for this agreement. This would have amounted to an irrevocable assignment of all rights in the policy under local law if properly made. (*Tompkins v. Tompkins,* supra, and cases cited therein.) The trial court refused to admit evidence on the matter, however, because the federal act gave the veteran the right to change the beneficiary at any time without the consent of the beneficiary.

Appellee on page 22 of her typewritten Statement in discussing the case of *United States v. Sterling,* 12 Fed. (2d) 921, supra, says:

> "The court held that no agreement could defeat insured's right to change beneficiary (which we agree with)."

This is a right given the assured by the federal act. Similarly he is given the right by the federal act to designate his mother the beneficiary of his policy in preference to his wife and he is assured by his government that the beneficiary he names will be protected in the use of the proceeds once she receives them.

United States v. Sterling, if correctly decided, is determinative of the issues in the case at bar. The wife was given the policy and paid all the premiums

on it personally and nevertheless the veteran was allowed to change the beneficiary and the new beneficiary was allowed to collect and keep the proceeds. The wife's own money used in paying the premiums is certainly as vested as a wife's community property interest in a husband's salary paid to him by his government as a Major, U. S. Army on duty in India.

The only distinctions between the *Sterling* case and the case at bar that appellee can suggest are that the United States was a party in the *Sterling* case and the point before the Court was specifically covered by the contract and the federal statute. We will discuss hereafter the question of the United States being a party. The question before the Court in the case at bar is specifically covered by the contract and the federal statute.

We also cited the case of *Tompkins v. Tompkins*, 132 N. J. L. 217, 38 Atl. (2d) 890, supra. The United States was not a party in that case. The rights of the wife were as vested as they can be in this type of property (which is not at all) and the right of the veteran to change beneficiary and the right of the new beneficiary to receive and use the proceeds under the provisions of the federal statute are recognized.

THE NECESSARY AND PROPER CLAUSE OF THE FEDERAL CONSTITUTION IS A GRANT OF POWER—NOT A LIMITATION ON EXPRESSED POWERS—AND THE COURTS LEAVE TO THE CONGRESS THE QUESTIONS OF PROPRIETY, WISDOM, NECESSITY, UTILITY AND EXPEDIENCY OF LEGISLATION WITHIN ITS EXPRESSLY DELEGATED POWERS.

It was contended by appellee before the lower court:

> "That in order to sustain Judge Mathes' decision (Barton case) it must appear first, that Congress intended to destroy the community property rights of California women, and second, that such destruction was 'necessary and proper' for carrying into execution the insurance program". (Appellee's typewritten Statement Exhibit "A" p. 7.)

The necessary and proper clause of the United States Constitution was also referred to as a limitation on the power of the Congress at pages 8, 17, 26 and 31 of Exhibit "A". The lower court did not discuss this matter, apparently accepting the presentation we made in Appellants' Answer To Memorandum Of Respondents' Oral Argument. Appellee-respondent repeats her argument in spite of its repudiation by the lower court.

We believe that the propositions of law stated in this point are so elementary, so firmly established and so fresh and clear to this Court that a few general statements of annotaters and text writers will suffice.

In the note to Article I, Section 8, Clause 18 of the United States Constitution in U.S.C.A. beginning on page 449 is the following:

> "2. Discretion as to means employed.—In the gift by the Constitution to Congress of authority

to enact laws 'necessary and proper' for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Legal Tender Cases (Tex., Mass. 1871) 12 Wall. 538, 20 L. Ed. 287. See, also, Matter of Jackson (C.C.N.Y. 1877) 14 Blatchf. (U.S.) 245, 13 Fed. Cas. No. 7, -124, petition for writ of habeas corpus denied (1878) 96 U.S. 727, 24 L. Ed. 877, and see Page v. U. S. (C.C.A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U.S. 627, 66 L. Ed. 799, holding that Congress had implied power to enact laws for the enforcement of the Eighteenth Amendment.

"Congress has a large discretion as to the means to be employed in the exercise of any power granted to it. Northern Securities Co. v. U. S. (Minn. 1904) 193 U.S. 343, 24 S. Ct. 436, 48 L. Ed. 679. See, also, Fairbank v. U. S. (Minn. 1901) 181 U.S. 287, 21 S. Ct. 648, 45 L. Ed. 862; Levin v. U. S. (C.C.A. Mo. 1904) 128 F. 826, 827.

"Federalist.—This clause is 'only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. * * * A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and caluminated provision in question do more than

declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless. But suspicion may ask, why then was it introduced? The answer is, that it could only have been done for greater caution, and *to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union.* The convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally sap the foundations of the Union; and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to ques-

tion the great and essential truth which it is manifestly the object of the provision to declare."

Hamilton, in *The Federalist*, No. XXXIII:

"Within the legitimate scope of this grant, Congress is permitted to determine for itself what is necessary and what is proper. Ex parte Curtis (N.Y. 1882) 106 U.S. 371, 1 S. Ct. 381, 27 L. Ed. 232."

On this subject, 11 *American Jurisprudence*, Section 138 of Constitutional Law, beginning at page 804 reads as follows:

"One of the most firmly established groups of principles which has become cardinal and elementary in the field of constitutional law is that the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people, * * *."

THE DECISION OF A FEDERAL COURT CONSTRUING AN ACT OF CONGRESS CLAIMED TO BE IN CONFLICT WITH STATE RULES OF LAW IS ENTITLED TO AS MUCH WEIGHT AS THE DECISION OF A STATE COURT ON THE SAME MATTER.

Appellee and the lower court have attempted to distinguish the case at bar from *Barton v. United States*, 75 Fed. Supp. 703, supra and the large number of other cases cited by appellants on the ground that the

federal courts were only deciding a controversy under Section 817 of the National Service Life Insurance Act of 1940[13] as amended (38 U.S.C. Sec. 817) incorporating by reference Section 19 of the World War Veterans Act as amended (38 U.S.C. Sec. 455).[14]

In addition to *Culp v. Webster*, supra and *Johnson v. Shelton*, supra, from California, we cited *Lawrence v. Shaw*, supra, *Sizemore v. Sizemore's Guardian et al.*, 222 Ky. 713, 2 S.W. (2d) 395, 396-7, *Sutton's Ex'r v. Barr's Adm'r*, 219 Ky. 543, 293 S.W. 1075, *Maddox v. Elliott*, supra, and *Tompkins v. Tompkins*, supra, all arising in State Courts and all cases upholding the provisions of the federal act and all cases in which the United States was *not* a party.

Most of the cases have arisen in Federal Courts, however, and in most of the cases the United States was a party. The reason is not far to seek. If a claimant of the proceeds of life insurance can get a judgment against the United States which is paying the money, he is much better off than he would be if his judgment only ran against the named beneficiary who was receiving the money from the United States. So in the case at bar the United States will continue to pay appellants the moneys called for by the insurance contract with their deceased son.

In the cases decided in Federal Courts all claimants of the proceeds are permitted to intervene and a decision by those Courts is final.

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[13]Act of Oct. 8, 1940, Chap. 757, Title 6, Part 1, Sec. 817, 54 Stat. 1014, Appendix page xvii.

[14]Act of June 7, 1924, Chap. 320, Sec. 19, 43 Stat. 612, as amended (38 U.S.C.A. Sec. 445), Appendix page i.

In deciding the controversy before it the Federal Court applies the same rules of law that the State Court of the state where the Federal Court sits should apply.

The principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 are binding on the Federal Court and the supremacy clause of the United States Constitution is binding on the State Court. As a matter of comity the first court to decide the question should follow the other unless clearly in error and when such a conflict occurs the only recourse is by appealing to this Court.

Chief Justice Marshall said:

> "* * * The People of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this Court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, any-

thing in the laws of any state to the contrary notwithstanding." (*McCulloch v. Maryland*, 4 Wheaton, 316.)

"THE JUDICIAL POWER OF THE UNITED STATES SHALL BE VESTED IN ONE SUPREME COURT[15] * * *" "THE JUDICIAL POWER SHALL EXTEND TO ALL CASES, IN LAW AND EQUITY, ARISING UNDER THIS CONSTITUTION, THE LAWS OF THE UNITED STATES[16] * * *"

The Supreme Court of the United States is interested in controversies between citizens of the United States which involve their rights under the federal constitution. It is not a mere adjunct of the federal government created to carry out and enforce federal laws in cases in which the United States is a party. As every male child born in the United States to citizens of this country can aspire to be president, so every suitor, however lowly, can expect to have his controversy passed upon by the Supreme Court of the United States if the requisite federal question is involved, and is raised in the proper manner and appellee, with her pious wish, inferred in her Point II of her typewritten Statement and expressed on page 25 thereof should be referred to some Court behind the Iron Curtain and not to a Court whose function was explained by Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheaton 316, in the words we have just quoted.

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[15]United States Constitution, Article III, Section 1, Appendix page xxvi.

[16]United States Constitution, Article III, Section 2, Appendix page xxvi.

THE CASE OF COOKE v. COOKE UPON WHICH THE LOWER COURT PRINCIPALLY RELIED IS NOT IN POINT.

The basis of the lower court's decision is the case of *Cooke v. Cooke*, 65 Cal. App. (2d) 260. (R. 31, 79, 89 A.C.A. 865, 201 Pac. (2d) 842-843.) In that case there had been a gift of an insurance policy by a husband to his wife followed by a divorce. The policy was not considered by the Court in the divorce proceedings nor mentioned in the decree but it was contended on behalf of the second wife after the husband's death that the divorce decree plus the Arkansas statute had had the effect of transferring the policy back to the husband.

This statute provided that when the husband obtained a divorce that an order should be entered restoring to each party all property which either party had obtained from the other during the marriage and in consideration or by reason thereof.

With nothing appearing but that a valid gift had been made of an insurance policy and thereafter a divorce decree entered which did not mention the policy the decision of the California Court dividing the proceeds between the two wives on the basis of the premiums paid before and after the second marriage was justified under California law and the Court in the *Cooke* case did not need to go further. All the rest of the discussion is mere dicta.

It was claimed however that the Arkansas statute was self executing and that by reason of that fact that the husband became the owner of the policy and his change of beneficiary to his estate was effective. The

Court compared the Arkansas statute and the Kentucky statute and found that the latter statute was self executing except in two cases and did not find that the Arkansas statute was intended to be self executing. If it had found that the Arkansas statute was not self executing it would have arrived at the conclusion it reached without the need of further discussion.

It held, however, that the Arkansas statute could not apply, if intended to be self executing, because to apply it would have the effect of depriving plaintiff of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and California Constitution, Art. I, Sec. 1. If this statement was intended to refer to anything other than procedural due process—the right of notice and an opportunity to be heard—it is error. Under California law and the law of every state in the Union where divorces can be obtained, a Court granting a divorce can divide some species of property acquired during the marriage between the parties. We must assume, therefore, that all the Court in the *Cooke* case was referring to, up to that point, was the doctrine of procedural due process. In this it was correct and the *Cooke* case was properly decided.

The Court went on, however, and said:

> "It has been repeatedly and consistently held by the California courts that the legislature has no constitutional power to deprive a person of property by means of a legislative enactment."

The usual and better statement of the rule is that the legislature can not take the property of one man and give it to another, since the legislature can, of course, deprive a person of property by use of the taxing power and also the police power. As we have already said, this statement is not necessary to the decision—it is mere dicta. The Court had already found that there had been a valid gift of the policy and that the divorce Court had not attempted to make any change in the title to it. It could have stopped there and its decision would have been complete. It could have said that it didn't find any indication of an intention of the Arkansas legislature to accomplish a change automatically and that would have ended the matter. It could have said that a legislative fiat cannot by itself transfer the property of A to B.

The *Cooke* case, and its highly interesting problems, however, cannot help us in the case at bar, no matter what it says.

In the first place the *Cooke* case is dealing with an insurance policy of a private company—with property created by a state and subject to the laws of the state. In the case at bar, the contract of insurance is of a special kind. It is a contract between the federal government and a member of the armed forces. The federal government can make any contract with a soldier it desires and the states can say nothing about it since the people in the Constitution have given Congress the power to pass laws to govern the armed forces.

In the second place the *Cooke* case is concerned with a state law that is attempted to be applied to change

title to a policy that at one time was admittedly owned by the first wife by reason of a gift. In the case at bar, the state law is attempted to be applied to give the wife rights in a policy that by its terms she doesn't have and never had.

In the third place, in the *Cooke* case the state law is not operative because it is in conflict with the supreme law of the land—the Fourteenth Amendment. In our case the state law is not operative because it is in conflict with the supreme law of the land—an Act of Congress passed in conformity with the Constitution of the United States.

In the fourth place, the *Cooke* case is concerned with a policy at one time owned by the wife by the husband's act and now sought to be reclaimed by the husband's representatives and the help of a state law, which could have helped if it had been used in time, and the matter litigated in the divorce proceedings. In the case at bar the wife is attempting to get an interest in property which her husband never intended her to have and by use of a state law that makes him the manager of the community property and only gives her the right to reclaim property when he gives it away if she claims it before it reaches the hands of an innocent purchaser for value.

In the fifth place, in the *Cooke* case the husband's representative sought to use a state law to regain an interest in a policy on his life and without success. In the case at bar, when the wife seeks to use a state law to get an interest in an insurance policy to be perfectly analogous her efforts should likewise be

without success. The state law is found inadequate to reverse a husband's gift of an insurance policy in the *Cooke* case and to be analogous the state law in the case at bar should also be found inadequate. Instead of being cited against our contention as the Court has used it, the case should be cited for our contention.

In the sixth place, the *Cooke* case is concerned with a state law which, if properly applied, could have accomplished the ends which it was claimed it had done. The federal government had not passed a statute that would have prevented the Arkansas Court from awarding the policy involved to the husband. In the case at bar the Congress of the United States has said in effect:

> Keep your hands off all moneys we pay to the beneficiaries named in this policy.

The *Cooke* case does not justify the lower court's decision in the case at bar.

SUMMARY.

SHORT ANSWERS TO SHORT STATEMENTS.

1.

Appellee: "This is not a suit in which the United States is involved as a party." (p. 23.)

Appellants: "The same rules of law should be applied to determine the rights of the claimants to the proceeds of a National Service Life Insurance policy in the state court as are applied in the federal courts when the United States is a party."

2.

Appellee: "The validity of the Congressional Act is not questioned and the holding in the case does not conflict with it in any way." (p. 23.)

Appellants: "The lower court being otherwise unable to avoid the clear, plain meaning of the provisions of the federal act held that the Congress did not have the power under the Tenth and Fifth Amendments to pass the act it passed."

3.

Appellee: "Appellants' only contention is that this court has jurisdiction because Section 454A contains the language:

> 'benefits shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever'

and as shown by this statement the courts have established that this language does not mean what appellants contend and that the proceeds are subject to court process and to seizure and to sequestration for the protection of certain rights." (p. 23.)

Appellants: "This court has jurisdiction of the case by certiorari and by appeal because the lower court refused to apply the provisions of the act quoted and held they were unconstitutional. No reported case agrees with the lower court on the constitutional question and that court expressly disagrees with the federal court sitting in the state and scores of other cases cited to the lower court and ignored by it. All courts, including the lower court, construe the federal statutes

and the state statutes involved in this case as being in direct conflict and repudiate the construction contended for by appellee."

4.

Appellee: "The language of Section 454a was intended to apply to *claims* and to creditors." (p. 23.)

Appellants: (A) The statute expressly exempts the proceeds from taxation from the claims of creditors *AND* from all other claims.

(B) The Congress intended the proceeds in the hands of the designated beneficiary to be exempt from all possible claims both before and after receipt by the beneficiary.

5.

Appellee: "The proceeds of the policy in question here are without question community property of the appellee and her deceased husband under the laws of California and are admitted to be such by the pleadings." (p. 24.)

Appellants: The pleadings admit that appellee and her deceased husband were married at all times in question and we admit that if these were the proceeds of a private life insurance policy that under the laws of the state of California appellee would prevail. Appellee's pleadings show that the insurance involved was taken out by her husband while in the Army and paid for by Army pay so her rights in the proceeds are only those agreed upon by her husband and the United States—nothing. *White v. United States,* supra; *Williams v. United States.*

6.

Appellee: "There is nothing in the language of 454a that seeks to take away the vested admitted community property right of the wife and every indication is that it was never intended that the statute go that far." (p. 24.)

Appellants: The plain meaning of the language used by the Congress is: "Payments of benefits * * * made to a beneficiary * * * shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary." What more could the Congress say?

7.

Appellee: "No court would uphold a secret agreement between a private individual and the husband depriving the wife of her interest in the proceeds of insurance."

"We do not believe the United States Government intended to enter into such a secret agreement and certainly no such agreement is necessary to the operation of the Veterans' Insurance Program." (p. 24.)

Appellant: The Congress intended to give each member of the armed forces the right to name the beneficiary of the insurance policy on his life, to change the beneficiary whenever he desired without permission of the beneficiary and to protect that beneficiary so named in the use of the proceeds of the insurance against any and all possible claims. The Congress had the power to so provide and the necessity,

propriety, wisdom or utility of such action is no concern of the courts.

8.

Appellee: "This court has already held that the act will not be construed to destroy the well recognized right of the United States government to include the proceeds of the policy in an estate for taxing purposes." (p. 24.)

Appellants: This was a tax on the transfer, the proceeds can not be taxed even after they have been deposited in a bank. *Lawrence v. Shaw*, supra.

9.

Appellee: "The logical conclusion from this holding is that the act will not be construed to destroy the well recognized vested property rights of women in California and other community property states." (p. 24.)

Appellants: There are no vested rights in the proceeds of a contract between a soldier and his government except those which the soldier and his government intend to be vested. *White v. United States*, supra; *Lynch v. United States*, supra.

10.

Appellee: "Courts have recognized that the funds are subject to seizure, process, and sequestration for alimony, support, and in guardianship matters. The interest of the wife provided in community property states is only an indirect method of providing ahead

of time for her support and care. Certainly it was not the intention of Congress to destroy this right." (p. 25.)

Appellants: The intent of the Congress as shown by the plain meaning of the words used and the whole scheme of the act is to give the insured in every state of the union the right to name the beneficiary of the insurance on his life and to protect that beneficiary in the use of the proceeds from any possible claim of any kind. The cases cited by appellee are opposed by more cases, more closely analogous cases and better reasoned cases. *"Hard cases make poor law."*

CONCLUSION.

No Court agrees with the decision of the lower court herein that an act of Congress passed pursuant to a delegated power is a violation of the Tenth Amendment and the due process clause of the Fifth Amendment because it announces different rules of property for a contract of the United States than the state rules applying to contracts between private individuals in the State.

There is a conflict between State and Federal Courts sitting in the state and between the lower court and Courts of other states and federal jurisdictions which can only be resolved by a decision of this Court.

The question is a novel one so far as this Court is concerned. It is one of great importance to thousands of people. The possibilities of increase in litigation

if the judgment of the lower court is not reversed are tremendous. This Court has jurisdiction both by certiorari and appeal. It is the function of the Supreme Court of the United States not only to determine controversies between the citizen and governmental agencies but also to determine controversies between private citizens which require the application of the appropriate rules of law contained in the Constitution of the United States.

The decision of the lower court violates the provisions of the Fourteenth Amendment and deprives appellants of property without due process of law by failing to apply the provisions of a federal act in violation of the supremacy clause of the United States Constitution.

This Court should exercise its jurisdiction, and reverse the judgment of the State Court.

Dated, Modesto, California,
June 17, 1949.

Respectfully submitted,
W. COBURN COOK,
VERNON F. GANT,
CARLOS J. BAIGER,
Attorneys for Appellants.

(Appendix Follows.)

Appendix

STATUTES.

Pensions, bonuses, veterans' relief.

38 U.S.C.A. Sec. 445. "Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions.

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Veterans' Administration acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the na-

ture of a bill of interpleader may be brought by the Veterans' Administration in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside: *Provided,* That no less than thirty days prior to instituting such suit the Veterans' Administration shall mail a notice of such intention to each of the persons to be made parties to the suit. The circuit courts of appeal and the United States Court of Appeals for the District of Columbia shall respectively exercise appellate jurisdiction and, except as provided in sections 346 and 347 of Title 28, the decrees of the circuit courts of appeal and the United States Court of Appeals for the District of Columbia shall be final.

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs.

Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war-risk insurance on the ground that the claim was barred by the statute of limitations shall not be bar to the institution of another suit on the same claim. No State or other statute of limitations shall be applicable to suits filed under this section.

"In any suit, action, or proceedings brought under the provisions of this chapter, subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district: *Provided,* That no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place holding the same without the permission of the court being first had upon proper application and cause shown. The word 'district' and the words 'district court' as used herein shall be construed to include the District of Columbia and the district court of the United States for the District of Columbia.

"Attorneys of the Veterans' Administration, when assigned to assist in the trial of cases, and employees

of the Veterans' Administration, when ordered in writing by the Administrator of Veterans' Affairs to appear as witnesses, shall be paid the regular travel and subsistence allowance paid to other employees when on official travel status.

"Part-time and fee-basis employees of the Veterans' Administration, in addition to their regular travel and subsistence allowance, when ordered in writing by the Administrator of Veterans' Affairs to appear as witnesses in suits under this section, may be allowed, within the discretion and under written order of the Administrator, a fee in an amount not to exceed $20 per day.

"Employees of the Veterans' Administration who are subpoenaed to attend the trial of any suit, under the provisions of this chapter, as witnesses for plaintiffs, shall be granted official leave for the period they are required to be away from the Veterans' Administration in answer to such subpoenas.

"The term 'claim', as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter. June 7, 1924, c.

320, Sec. 19, 43 Stat. 612; Mar. 4, 1925, c. 553, Sec. 2, 43 Stat. 1302; May 29, 1928, c. 875, Sec. 1, 45 Stat. 964; July 3, 1930, c. 849, Sec. 4, 46 Stat. 992; July 3, 1930, c. 863, Sub. Sec. 1, 2, 46 Stat. 1016; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921."

38 U.S.C.A. 454a. "Assignability and exempt status of payments of benefits.

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims or creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. From and after October 17, 1940, this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary or his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating

to veterans, to such beneficiary or his estate or to his dependents as such: *Provided, however,* That if the benefits be insurance payable by reason of yearly renewable term or of the United States Government life (converted) insurance issued by the United States, the exemption herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: *Provided further,* That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title. Aug. 12, 1935, c. 510, Sec. 3, 49 Stat. 609; Oct. 17, 1940, c. 893, Sec. 5, 54 Stat. 1195."

38 U.S.C.A. 514. "Payment of insurance to estate of deceased beneficiary; escheat to United States.

"If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: *Provided,* That all awards of yearly renewable term in-

surance which were in course of payment on March 4, 1925, shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this chapter. When any person to whom such insurance was awarded prior to such date dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person: *Provided further,* That no award of yearly renewable term insurance made to the estate of a last surviving beneficiary prior to March 4, 1925, shall be affected by the foregoing provisions. In cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of October 6, 1917. June 7, 1924, c. 320, Sec. 303, 43 Stat. 625; Mar. 4, 1925, c. 553, Sec. 14, 43 Stat. 1310."

38 U.S.C.A. 686c. "Adjusted-service certificates; time and manner of payment; issuance of bonds; interest; deceased or incompetent veterans; designation of postal employees as fiscal agencies; lost, stolen, or destroyed bonds.

"* * * Such bonds shall be issued under the authority and subject to the provisions of the Second Liberty Bond Act, as amended, and shall not be transferable, assignable, subject to attachment levy, or seizure under any legal or equitable process and shall be payable

only to the veteran or, in case of death or incompetence of the veteran, to the representative of his estate. * * * Jan. 27, 1936, c. 32, Sec. 4, 49 Stat. 1101; June 3, 1936, c. 482, Sec. 2, 49 Stat. 1396; June 26, 1936, c. 848, 49 Stat. 1982; Aug. 14, 1937, c. 628, 50 Stat. 641."

38 U.S.C.A. 802. "Person insurable; premiums; type of insurance; benefits and beneficiaries; effective date and amount of insurance—Persons entitled to insurance; persons entering service.

"(g) Beneficiaries. The insurance shall be payable only to a widow, widower, child (including stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: *Provided,* That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life-insurance policy maturing on or after August 1, 1946."

"(h) Manner of payment of benefits. Insurance maturing prior to August 1, 1946, shall be payable in the following manner:

"(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly install-

ments: *Provided*, That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: *Provided further*, That in case in which insurance benefit payments were commenced prior to September 30, 1944, the beneficiary, whether or not the first beneficiary, shall have the right to elect to receive a refund life income, as provided in such optional settlement, payable in monthly installments adjusted as of the date of the maturity of such policy, credit being allowed for payments previously made on the insurance. The right of election with respect to cases in which benefit payments were commenced prior to September 30, 1944, shall terminate two years after August 1, 1946. The Administrator is directed to send, within one year after August 1, 1946, to each beneficiary of insurance on which payments were commenced prior to September 30, 1944, a notice explaining the right of election. Any such notice shall be sent by registered mail addressed to the last known address of the addressee.

"(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of ma-

turity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary: *Provided,* That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: *Provided further,* That such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months: *Provided further,* That in any case in which insurance benefit payments were commenced prior to September 30, 1944, the beneficiary, whether or not the first beneficiary, shall have the right to elect to receive a refund life income, as provided in such optional settlement, payable in monthly installments adjusted as of the date of the maturity of such policy, credit being allowed for payments previously made on the insurance. The right of election with respect to cases in which benefit payments were commenced prior to September 30, 1944, shall terminate two years after August 1, 1946. The Administrator is directed to send, within one year after August 1, 1946,

to each beneficiary of insurance on which payments were commenced prior to September 30, 1944, a notice explaining the right of election. Any such notice shall be sent by registered mail addressed to the last known address of the addressee.

"(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—

(A) to the widow or widower of the insured, if living;

(B) if no widow or widower, to the child or children of the insured, if living, in equal shares;

(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;

(D) if no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares."

"(i) Payment of benefits where beneficiary undesignated or dead.

"If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of

this section and the insurance shall be payable in equal monthly installments, shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h) of this section. The provisions of this subsection shall not be applicable to insurance maturing on or after August 1, 1946."

"(j) Payment of benefits to heirs, etc., of insured or beneficiary; death of all permitted beneficiaries.

"No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, except that if the reserve of a contract of converted national service life insurance, together with dividends accumulated thereon, less any indebtedness under such contract, exceeds the aggregate amount paid to beneficiaries, the excess shall be paid to the estate of the insured unless the estate of the insured would escheat under the laws of his place of residence, in which event no payment shall be made. The provisions of this subsection shall not be applicable to insurance maturing on or after August 1, 1946." Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 602, 54 Stat. 1009; Dec.

20, 1941, c. 602, Sec. 10, 55 Stat. 846; Feb. 11, 1942, c. 69, 56 Stat. 88, as amended.

38 U.S.C.A. 804. "Appropriations for payment of liabilities; payments from.

"There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this chapter, to be known as the National Service Life Insurance appropriation, for the payment of liabilities under National Service Life Insurance. Payments from this appropriation shall be made upon and in accordance with awards by the Administrator. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part. I, Sec. 604, 54 Stat. 1011."

38 U.S.C.A. 805. "National Service Life Insurance Fund; creation; payments into and from; reserves; investments.

"(a) There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

"(b) The Administrator is authorized to set aside out of such fund such reserve amounts as may be re-

quired under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest such fund, or any part thereof, in interest-bearing obligations of the United States or in obligations guaranteed as to principal and interest by the United States, and to sell such obligations for the purposes of such fund. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 605, 54 Stat. 1012."

38 U.S.C.A. 806. "Administrative costs.

"The United States shall bear the cost of administration in connection with this chapter, including expenses for medical examinations, printing and binding, and for such other expenditures as are necessary in the discretion of the Administrator. The appropriations made for the Veterans' Administration for the fiscal year 1941 for administrative expenses shall be available for the payment of such costs of administration under this chapter. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 606, 54 Stat. 1012."

38 U.S.C.A. 807. "Costs of excess mortality and premium waiver; liability for benefits for death resulting from extra hazard of military or naval service.

"(a) The United States shall bear the excess mortality cost and the cost of waiver of premiums on account of total disability traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator.

"(b) Whenever benefits under such insurance become payable because of the death of the insured as

the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the liability for payment of such benefits shall be borne by the United States in an amount which, when added to the reserve of the policy at the time of death of the insured, will equal the then value of such benefits under such policy. Where life contingencies are involved in the calculation of the value of such benefits of insurance heretofore or hereafter matured, the calculation of such liability or liabilities shall be based upon such mortality table or tables as the Administrator may prescribe with interest at the rate of 3 per centum per annum. The Administrator is authorized and directed to transfer from time to time from the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to carry out the provisions of this section. As amended Aug. 1, 1946, c. 728, Sec. 11, 60 Stat. 788.

"(c) Whenever the premiums under such insurance are waived as provided in section 802 (n) because of the total disability of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the premiums so waived shall be paid by the United States and the Administrator is authorized and directed to transfer from time to time an amount equal to the amount of such premiums from the National Service Life Insurance appropriation to the National Service Life In-

surance Fund. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 607, 54 Stat. 1012, as amended."

38 U.S.C.A. 808. "General administrative provisions.

"The Administrator, subject to the general direction of the President shall administer, execute, and enforce the provisions of this chapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this chapter as may be assigned to them by the Administrator. All official acts performed by such officers and employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator. Except in the event of suit as provided in section 817 of this title, or other appropriate court proceedings, all decisions rendered by the Administrator under the provisions of this chapter, or regulations properly issued pursuant thereto, shall be final and conclusive on all questions of law or fact, and no other official of the United States, except a judge or judges of United States courts, shall have jurisdiction to review any such decisions. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 608, 54 Stat. 1012. As amended Aug. 1, 1946, c. 728, Sec. 12, 60 Stat. 788."

38 U.S.C.A. 817. "Suits in event of disagreement as to claims.

"In the event of disagreement as to any claim arising under this chapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 618, 54 Stat. 1014. As amended July 11, 1942, c. 504, Sec. 6, 56 Stat. 659; Aug. 1, 1946, c. 728, Sec. 14, 60 Stat. 788."

CASES.

Nobles v. Cannell, Superior Court of State of California. In and for the County of Los Angeles, No. 502,587, Opinion, dated May 31, 1946.

"Plaintiff and William Cannell were married on February 22nd, 1942, and on the fourteenth of October of that year he was inducted into the United States Army. While in the army he contracted an incurable and fatal disease. His mother, Nettie Cannell, who is a trained nurse, learning that he was in an army hospital and that he could not get well took the plaintiff with her, went to where he was, and insisted on his being discharged from the service. When she accomplished this she brought him to her home and nursed him there. Defendants advanced $280.00 to the plaintiff for the trip to get the veteran and there was

paid by them the sum of $1169.19 for hospital bills, drug bills, doctor bills and for blood donors for the veteran, and in addition they paid $91.00 in premiums on an insurance policy of the veteran's, other than the policy involved in this suit. There was evidence as to what nursing and care for the veteran would have cost in a private hospital but none as to what it would have cost in a private home such as that involved here. The amount of money advanced and bills paid for the veteran and the value of services rendered him by defendants is only material in so far as it goes to show that there could have been a valid consideration for anything of value turned over to defendants by the veteran. William Cannell died October 28th, 1944. Not by way of minimizing what the veteran's parents did for him but simply in passing it may be well to point out that there is no evidence that the veteran was not receiving every care in the government hospital and that this care would not have continued. Also it may be remembered that the idea of taking William out of the government hospital, having him discharged, and of bringing him to his parents' home and of caring for him there was the idea of the veteran's mother, and regardless of how worthy her actions, the fact remains that she treated him and his wife just as if he were still her unmarried son.

"On the first of August, 1943, a life insurance policy in the sum of Ten Thousand Dollars was issued to the veteran by the National Service Life Insurance, in which plaintiff, his wife, was named as sole beneficiary. To pay the premium on the policy William

Cannell authorized the deduction of seven dollars per month from his army pay, commencing August 1st, 1943, and continuing thereafter; the premium from August 1st, 1943, to July 31st, 1944, being paid under this authorization. On July 3rd, 1944, William Cannell was given a medical discharge from the army, at his mother's insistence, and the premiums on the policy for the months of August, September and October, 1944, were paid by defendants. On the 11th of July, 1944, the insured veteran executed a request for change of beneficiaries on the life insurance policy, in which he designated his wife, Marion Louise Cannell, and his daughter, LeDean May Cannell, principal beneficiaries in equal shares of Five Thousand Dollars each. On the 8th of August, 1944, the beneficiaries on the policy were again changed and this time the serviceman's daughter and mother were designated as the sole beneficiaries in equal shares of Five Thousand Dollars each, and this is the way the beneficiaries of the policy stood at the date of the death of William Cannell. The policy was granted under the National Service Life Insurance Act of 1940, which insurance is administered by the Veterans' Administration. * * *

"Coming now to the question of the insurance policy the first question presented is: 'has this Court jurisdiction to determine the property rights in this policy?' The object of the law providing that suits may be brought in the Federal Court was for the protection of the Veterans Bureau and the Government, it was to protect the United States Government from

having to litigate in all the different state courts of the United States. In other words it had application only where the United States was a party to the suit. This is demonstrated by the case of United States v. Pfitsch, 256 U.S. 547, wherein it is stated: 'Furthermore it is significant that this is not the only occasion upon which Congress has provided for *suits against the United States exclusively in the District Court, etc.*' This is not a suit against the United States. The Court therefore determined that it has jurisdiction of this suit which is between citizens of this state concerning the establishment of a trust in the proceeds of a war risk insurance policy. The United States can be forced to do only what it has agreed to do in the policy and it has agreed to pay the money to the named beneficiaries. However regardless of the fact that the United States can stand on its rights as expressed in the policy it does not have the right to say to the wife of a deceased veteran that regardless of the fact that the premiums were paid with community property that she shall not be entitled to insist that she receive a half of the proceeds of the policy on the death of her husband. This she does not get by reason of being designated as a beneficiary but by reason of the fact that the policy is purchased with community money. The policy is not a gratuity, Lynch v. U. S., 292 U.S. 570. Although the insurance contract was not entered into by the U. S. for gain it nevertheless charges for the same—the soldier is simply permitted to buy insurance for a rate much less than that charged by private companies. Nor does this Court consider the field in which it

might be said what a soldier can buy with his money and to whom the purchased article would belong as a field which the Federal Government is entitled to occupy exclusively. The object of the insurance is primarily the protection of the soldier and his dependents and certainly the wife of the soldier falls within this classification. The earnings of a married soldier are, under the laws of the State of California, community property. If they are used to buy a war risk insurance policy for a reduced rate—the policy is community property—and to permit the soldier to give the proceeds away, in case of his death, to the exclusion of his wife, would permit him to make a gift of the wife's half of the community property. Coming now to the question of whether or not the designation of the mother of the veteran as being entitled to one-half of the policy constituted a gift to her, we find that she testified that she did not expect to be paid for the services to her son, but that she expected something from the daughter-in-law and that she rendered the services because of the love and affection she bore her son. This would not indicate that as stated in the case of Crane v. Derrick, 157 Cal. 667, the circumstances were such that it warranted the inference that it was the expectation of both parties that compensation should be made. Such a situation as results from the defendant's testimony would negative the idea that the services should be considered a valuable consideration for the making of Nettie Cannell the beneficiary of one-half of the insurance policy. On the 8th of August, 1944, when the last change of beneficiaries was made there was very little indebted-

ness owed by the veteran to Nettie Cannell, so this could not be held to be a valuable consideration. In this connection it may be pointed out that as a beneficiary of the insurance policy she would receive money that would not be community property of herself and husband. The veteran was entitled to give away one-half of the benefits of the policy. He attempted to give it all away—one-half to his daughter and one-half to the defendant. This he was not permitted to do. If all of the facts and parties were properly before this Court which would entitle it to make a decision on the question of the life insurance and who was entitled to it the Court would hold that the plaintiff was entitled to a one-half of the policy, the defendant to a one-fourth of the policy and the veteran's daughter a one-fourth of the policy. This decision would be arrived at by reasoning that when the soldier designated the daughter as entitled to one-half and the defendant as entitled to one-half he gave away wrongfully the one-half interest of the wife—and that since she was entitled to a one-half the interest of each of the other parties would have to be reduced to a fourth. The Court feels that when the beneficiaries of a policy are changed the mere fact that one was a beneficiary before the change and was again made a beneficiary after the change would not give him any more rights than if they had not been mentioned in the first place. The decision above-mentioned which the Court would make if all parties and facts were properly before it the Court would carry out by designating the recipients of the insurance money as trustees for the plaintiff to the extent that

they should pay over to her of what they received that proportion which would give her a one-half of the insurance money. However the Court finds that it can make no decision on the insurance money under the state of the pleadings, etc. because the daughter is not a party to this suit and before a determination could be made which would of necessity affect the rights of the daughter she would have to be represented. Unless appropriate steps can be taken to remedy this situation the Court will be required to find for defendant in regard to the insurance money.

"Attorney for plaintiff to prepare findings of fact and conclusions of law and judgment in accordance with the view expressed in this opinion.

"Dated this 31st day of May, A.D., 1946.

Ben V. Curler
Judge of said Superior Court."

Nobles v. Cannell, Superior Court of State of California, In and For County of Los Angeles, No. 502,587, Judgment, Dated October 27, 1948.

"This cause came on regularly for trial before the above entitled court in Department No. 46, on the thirty-first day of October and the first day of November, 1946, the Honorable Ben V. Curler, Judge presiding, the plaintiff appearing in person and by Reynolds and Painter, her attorneys, and the defendants appearing in person, and by Earle Stuart Rhode and Earl Blodgett, their attorneys. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury, whereupon witnesses on the part of plaintiff

and defendants were duly sworn and examined, and documentary evidence introduced by the respective parties; and the evidence being closed, the cause was submitted to the court for consideration and decision. On May 31, 1947, an opinion was rendered in which attention was called to the fact that LeDean Mae Cannell whose name is now LeDean Mae Nobles had not been made a party to this action, and on November 14, 1947, an order was made to permit plaintiff to file an instrument designated 'Consent and Waiver', which was then done. That on September 13, 1948, in Department No. 30, of the above entitled court, the Honorable Ben V. Curler, Judge presiding; Louis Miller appearing for Reynolds and Painter, attorneys, on behalf of plaintiff; Earle Stuart Rhode appearing on behalf of defendants; and Robert Komins, Assistant United States Attorney, appearing for United States of America, Amicus Curiae; and the law as to the facts in evidence having been duly presented and argued; and the court having considered the same, and being fully advised in the premises, the court files its findings of fact and conclusions of law in writing, and orders that judgment be entered in favor of plaintiff against defendant Hugh Cannell, and in favor of defendant Nettie Cannell against plaintiff in accordance therewith.

"Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that Marion Louise Cannell Nobles, the plaintiff do have and recover, of and from Hugh Cannell, defendant, the sum of Two Hundred Nine and twenty-nine hundredths Dollars ($209.29), with interest thereon, at

the rate of seven per cent, per annum, from the date hereof until paid.

"It is further hereby ordered, adjudged and decreed that the entire proceeds of the policy of national service life insurance issued on the life of William Edmond Cannell in the face amount of Ten Thousand Dollars ($10,000.00) are payable and awarded to defendant Nettie Cannell, born June 8, 1879, as sole beneficiary as to Five Thousand Dollars ($5,000.00), and to LeDean Mae Cannell whose name is now LeDean Mae Nobles, born February 22, 1943, as sole beneficiary as to Five Thousand Dollars ($5,000.00), duly registered with the Veterans Administration as to said policy, all under the terms and conditions of said policy and as provided therein, and that said defendant Nettie Cannell and LeDean Mae Cannell whose name is now LeDean Mae Nobles, as beneficiaries so registered as to said policy and as their interest may appear therein, are entitled to receive all of the proceeds and benefits of said policy.

"It is further hereby ordered, adjudged and decreed that defendant Nettie Cannell, do have and recover her costs and disbursements incurred herein, in the sum of $6.50 and may have execution issued therefor.

"Dated this 27th day of October, 1948.

Ben V. Curler,
Judge of Superior Court."

Article III, Sec. 1.

"The judicial Power of the United States, shall be vest in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, Section 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER and LEANDOUS H. WISSNER,

Appellants,

vs.

MARGARET WISSNER,

Appellee.

Appeal from the District Court of Appeal, State of California, Third Appellate District.

APPELLANTS' BRIEF.

W. COBURN COOK,
Berg Building, Turlock, California,
VERNON F. GANT,
CARLOS J. BADGER,
National Bank Building, Modesto, California,
Counsel for Appellants.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER and LEANIOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee.

Appeal from the District Court of Appeal, State of California, Third Appellate District.

APPELLANTS' BRIEF.

The appeal is from the judgment of the District Court of Appeal, Third Appellate District, State of California.

OPINION BELOW.

The trial Court rendered no opinion; its findings of fact, conclusions of law and judgment are at Tr. 10-

16. The opinion of the District Court of Appeal filed January 21, 1949, is reported in 89 A.C.A. 857, 201 Pacific 2d 837 (Tr. 17-29). The Appellate Court denied rehearing without opinion (Tr. 29). The Supreme Court of California denied a hearing without opinion (Tr. 30).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The state courts have refused to apply the provisions of an act of the Congress, upon which appellants relied, and instead have applied conflicting state rules and have held the applicable provisions of the Congressional Act void under the Fifth and Tenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The statutory provisions believed to sustain the jurisdiction of this Court are Title 28, U. S. Code, Section 1257 (1) and (2) and under the authority of *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 547, and *Flournoy v. Weiner*, 321 U. S. 253, 263, the right to a review of the judgment of the lower court by writ of certiorari under Title 28, U. S. Code, Section 1257 (3) is also presented herein.

CASES BELEVED TO SUSTAIN JURISDICTION OF THIS COURT.

Cases believed to sustain the jurisdiction of this Court are:

Logan County National Bank v. Townsend, 139 U. S. 67, 72;

Toledo etc. Railroad Company v. Slavin, 236 U. S. 454, 457;

Green Bay Canal Co. v. Patten Paper Co., 172 U. S. 58, 66;

Missouri etc. R. Co. v. Haber, 169 U. S. 613, 621-622;

McGuire v. Massachusetts, 3 Wall. 382, 385;

Garrett v. Moore-McCormack, 317 U. S. 239, 245-246;

Flournoy v. Weiner, 321 U. S. 253, 263;

Anderson v. Carkins, 135 U. S. 483, 485, 486;

Clearfield Trust Co. v. United States, 318 U. S. 363, 366;

United States v. Emory, 314 U. S. 423, 426-427.

STATEMENT OF THE CASE.

All facts necessary for the determination of the questions involved are admitted in the pleadings (Tr. 1-10).

Issues involving property other than the proceeds of the National Service Life Insurance policy with which we are concerned have been settled by the decision of the Court below.

Appellants are the mother and father of Dr. Leonard O. Wissner who at the time of his death in Kalai Kunda, India, on November 14, 1945, was a Major in the United States Army (Tr. 3-5). Appellee is his surviving widow (Tr. 11).

Dr. Wissner and appellee were married at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and up to the death of Leonard O. Wissner were husband and wife and at all times subsequent to the marriage and until his death were residents of and domiciled in the State of California (Tr. 11).

While Dr. Wissner was serving in the army, he applied for and there was issued to him a National Service Life Insurance policy No. 14N8656931 (Tr. 3, 8), the premiums of which were paid by Dr. Wissner from his army pay (Tr. 3, 8). He designated his mother, Louise M. Wissner, as principal beneficiary of the policy and his father, Leandous H. Wissner, as contingent beneficiary (Tr. 3, 9). The policy was in full force and effect at the time of the Doctor's death (Tr. 12-13) and since that time the Doctor's mother, appellant, Louise M. Wissner, has received funds from the Administrator of Veterans Affairs of the United States, amounting to $76.70 for each month (Tr. 9).

Appellee claims to be entitled to one-half of this payment as received each month under the community property laws of the State of California (Tr. 6). The state courts found in favor of appellee's claim and refused to apply the provisions of the federal statutes

which control the rights in the proceeds of National Service Life Insurance (Tr. 15, 16, 17).

STATUTES INVOLVED.

The federal statute, the provisions of which were held inapplicable and void is Section 3, 49 Statute 609, 38 U. S. C. A. Section 454a, Act of August 12, 1935, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and *shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary* * * *" (Italics ours.)

The provisions of the state statute which the Court applied and which appellants claim are inapplicable to the case and void as applied by the lower Court to the property involved are Civil Code of California, Sections 162, 163, 164, 161a.

> Section 162. "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits, thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."
>
> Section 163. "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents,

issues, and profits thereof, is his separate property."

Section 164. "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; * * *"

Section 161a. "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172[1] and 172a[2] of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

DATE OF JUDGMENT AND APPLICATION FOR APPEAL.

The decision and judgment of the District Court of Appeal were filed January 21, 1949, (Tr. 17). A petition for rehearing was denied February 11, 1949 (Tr. 29).

The District Court of Appeal is the highest Court of the State in which decision could be had unless a hearing were granted by the Supreme Court of California

[1] Appendix page xv.
[2] Appendix page xv.

at its discretion (Constitution of California, Article VI, Secs. 4, 4a, 4b, 4c). A hearing was denied March 21, 1949 (Tr. 30). The application for appeal was presented May 16, 1949 (Tr. 30). Order allowing appeal was made and entered May 16, 1949 (Tr. 33). Probable jurisdiction was noted by this Court October 10, 1949.

RAISING THE FEDERAL QUESTIONS.

Appellants raised the federal questions in their answer (Tr. 8, 9) pressed them throughout the case, argued them in all briefs on appeal[3] and the federal questions were expressly passed on by the District Court of Appeal of the State of California, Third Appellate District (Tr. 17-29).

The Appellate Court in its opinion summarizes appellants' contentions made in their briefs and argument on appeal as follows:

> "Appellants contend, however, that rights to the proceeds of a National Service Life Insurance policy must be determined solely by federal statutes. They cite section 802 (g) of Title 38 U. S. C. A. which provides regarding such policies: 'The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall

[3]Under the California practice, an appeal is taken merely by notice (Tr. 17) and there is no assignment of errors. The questions presented on appeal are stated only in the briefs.

have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.'

"They particularly rely upon section 454a of the World War Veterans' Relief Act, Title 38 U. S. C. A., which provides in part: 'Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, *shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*' (Italics added.)

"Any they assert that Congress by the foregoing enactment not only intended to control the proceeds of such policies after they were paid to them, but that its power to do so is found in the provisions of the United States Constitution, art. I, § 8, granting to Congress the power to 'provide and maintain a Navy', to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. They also rely upon Art. VI, paragraph 2, of that Constitution providing that such Constitution and the laws of the United States which shall be made in pursu-

ance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding" (Tr. 22-23).

The Court below affirmed the judgment of the lower Court awarding one-half of the proceeds of the National Service Life Insurance policy to appellee in these words:

> "In the case before us the judgment was entered against the beneficiaries for one-half of the payments on the policy which they had already received, and they were ordered to pay to plaintiff one-half of proceeds received by them. Such judgment is fully in accord with the judgments in the Cooke case and other cases above cited, and cannot be said to infringe upon any rights or powers of the United States under the provisions of the United States Constitution relied upon by appellants" (Tr. 26).

The Court stated that the question to be decided on appeal was:

> "The question before us, then, is did Congress intend, by section 454a, supra, to provide that the proceeds of a National Service Insurance policy, after payment of same to a named beneficiary, are not subject to the laws of a state governing title to property within that state, and, if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such a wife has a vested interest" (Tr. 23).

and in deciding the question said as follows:

> "Reasoning from the foregoing cases, the conclusion seems to follow that, in view of the Fifth Amendment, the federal government *had no power to provide*, as it is contended it did in section 454a, supra, that payments made to a beneficiary of a National Service Life Insurance policy shall be exempt from the claims of the wid- of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary" (Tr. 25). (First italics ours).

and continued as follows:

> "As hereinbefore stated, appellants rely upon art. VI, paragraph 2, and art. I, sec. 8, of the United States Constitution. But no cognizance is taken of the Fifth Amendment, which limits the power of the Federal Government as the Fourteenth Amendment limits those of the states, and prohibits the taking of private property without due process of law. It therefore seems to follow that if, as decided in Cooke v. Cooke, supra, a surviving wife of a decedent who had paid for an insurance policy out of community funds could not be deprived of her vested interest in the proceeds of such policy without violating the provisions of the Fourteenth Amendment, the Federal government could not deprive a wife of the deceased veteran of her vested right to one-half of the proceeds of a National Service Life Insurance policy paid for out of community funds, at least after such funds had come into the possession of a named beneficiary other than the wife, without violating the Fifth Amendment" (Tr. 25-26).

and the Court below expressly disagreed with the decision of a Federal District Court in this state which had held that the Federal statutes relied upon by the appellants controlled the rights in the proceeds of a National Service Life Insurance policy and that the California community property laws were not applicable and in disagreeing with the Federal Court said:

> "Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of National Service Life Insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is Barton v. United States, D. C., 75 F. Supp. 703, in which a widow of a deceased veteran applied to the Administrator of Veterans' Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his deci-

sion. The Barton decision is not, of course, conclusive upon this Court; and we think it is clearly distinguishable in so far as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that Court decided that because of the provisions of section 454a, supra, the Congress intended to and did attempt to provide that where premiums on a National Service Life Insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of the decedent may be divested of her community property right by the action of the husband in using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case" (Tr. 27-28).

SPECIFICATION OF ERRORS.

Appellants rely upon all errors assigned (Tr. 35) and for easy reference copy them as follows:

"1. The District Court of Appeal of the State of California ((Fol. 39)) Third Appellate District, erred in affirming a judgment of the Supeior Court of the State of California in and for the County of Stanislaus which awarded one-half the proceeds, paid and to be paid, of a National Service Life Insurance policy to appellee, a soldier's

widow, under the community property law of the state when the soldier had designated appellants, his parents, the beneficiaries of the policy and the federal statutes provide:

> 'Payments made to, or on account of, a beneficiary under any of the laws relating to veterans * * * shall not be liable to attachment, levy, or seizure by or under any legal or equitable process, whatever, either before or after receipt by the beneficiary.'

and thereby deprived appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"2. The District Court of Appeal of the State of California, Third Appellate District, erred in applying the provisions of the California community property law and in awarding one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, to appellee and thereby deprived appellants of their property contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"3. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it failed to apply the provisions of an act of the Congress and awarded appellee judgment for one-half the proceeds of a National Service Life Insurance policy.

"4. The District Court of Appeal of the State of California, Third Appellate District, erred and

deprived appellants of ((fol. 40)) their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress and held that the provisions of the act were invalid under the Fifth Amendment to the Constitution of the United States.

"5. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it held that the provisions of an act of Congress were invalid under the Tenth Amendment to the Constitution of the United States and refused to apply them on appellants' behalf.

"6. The District Court of Appeal of the State of California, Third Appellate District erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it ignored the provisions of Article VI, paragraph 2 of the Constitution of the United States and awarded appellee one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, by applying California laws relating to community property and ignoring the provisions of the federal statutes in conflict therewith.

"7. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due

process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress in appellants behalf and held that the provisions of the act were void under the Fifth and Tenth Amendments to the Constitution of the United States.

"((fol. 41)) PRAYER FOR REVERSAL

For which errors the appellants, Louise M. Wissner and Leandous H. Wissner, pray that the the judgment of the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause, in so far as it affects the rights of the appellants to retain the proceeds of a National Service Life Insurance policy, be reversed and a judgment rendered in favor of the said appellants on said issues and for costs."

SUMMARY OF ARGUMENT

Among the powers delegated to the Congress by the people in the Constitution of the United States are the powers to provide for the common defense and general welfare of the United States, "to raise and support Armies, to provide and maintain a Navy and to make rules and regulations for the government and regulation of the land and naval forces."[1]

The power given to Congress to make all Laws which shall be necessary and proper for carrying into

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[1]United States Constitution, Article I, Section 8, c11, c12, c13, c14.

execution the foregoing powers[5] is not a limitation on the exercise of the expressly delegated powers but is a further grant of power.

The provisions of the National Service Life Insurance Act provide:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary[6] * * *"

These provisions are the supreme law of the land[7] and state rules of law in conflict with these provisions are void. This enactment having been made pursuant to expressly delegated powers is not invalid under the Tenth Amendment and the property rights having been created by an act of the Congress, the exclusive control of them by the Congress is not a violation of the due process clause of the Fifth Amendment.[8]

As subsidiary to these clearly established basic Constitutional rules of law, it will appear that the enactments by the Congress show an intention to establish a uniform system of insurance completely covering

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[5]United States Constitution, Article I, Section 8, Clause 18.

[6]Section 3, 49 Statute 609; 38 U.S.C.A. Section 454a, Act of August 12, 1935, Chapter 510.

[7]Constitution of the United States, Article VI, Section 2.

[8]*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, Dicta 78, 79; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366; *United States v. County of Allegheny*, 322 U.S. 174

the area of this controversy in words whose meaning as applied to the facts in this case cannot be questioned.

ARGUMENT

I.

CONGRESS HAS THE POWER TO PROVIDE INSURANCE FOR THE MEMBERS OF THE ARMED FORCES.

"The Congress shall have power * * * to raise and support armies * * * to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces;"[9]

"Among the power assigned to the national government are the power 'to raise and support armies,' and the power 'to make rules for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, and the compensation he shall be allowed, and the service to which he shall be assigned. Tarble's Case, Wis. 1872, 13 Wall. 408, 20 L. Ed. 597."[10]

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[9]United States Constitution, Article I, Section 8, Clauses 12, 13 and 14.

[10]Note 1, Constitution, Article I, Section 8, Clause 12, U.S.C.A., page 686.

II.

THE NECESSARY AND PROPER CLAUSE OF THE FEDERAL CONSTITUTION IS A GRANT OF POWER—NOT A LIMITATION ON EXPRESSED POWERS—AND THE COURTS LEAVE TO THE CONGRESS THE QUESTION OF PROPRIETY, WISDOM, NECESSITY, UTILITY AND EXPEDIENCY OF LEGISLATION WITHIN THE SCOPE OF ITS EXPRESSLY DELEGATED POWERS.

We believe that the propositions of law stated in this point are so elementary, so firmly established and so fresh and clear to this Court that a few general statements of annotaters and text writers will suffice.

In the note to this clause in U.S.C.A. beginning on page 449 is the following:

> "2. Discretion as to means employed.—In the gift by the Constitution to Congress of Authority to enact laws 'necessary and proper' for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Legal Tender Cases (Tex., Mass. 1871) 12 Wall. 538, 20 L. Ed. 287. See, also, *Matter of Jackson* (C.C.N.Y. 1877) 14 Blatchf. (U.S.) 245, 13 Fed. Cas. No. 7,-124, petition for writ of habeas corpus denied (1878) 96 U.S. 727, 24 L. Ed. 877, and see *Page v. U. S.* (C.C.A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S.Ct. 461, 258 U.S. 627, 66 L. Ed. 799, holding that Congress had

implied power to enact laws for the enforcement of the Eighteenth Amendment.

"Congress has a large discretion as to the means to be employed in the exercise of any power granted to it. *Northern Securities Co. v. U. S.* (Minn. 1904) 193 U.S. 343, 24 S. Ct. 436, 48 L. Ed. 679. See, also, *Fairbank v. U. S.* (Minn. 1901) 181 U.S. 287, 21 S.Ct. 648, 45 L. Ed. 862; *Levin v. U. S.* (C.C.A. Mo. 1904) 128 F. 826, 827.

"Federalist.—This clause is 'only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. * * * A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes has been previously given, might in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorized the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be

sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless. But suspicion may ask, why then was it introduced? The answer is, that it could only have been done for greater caution, and *to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union*. The convention probably forsaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally sap the foundations of the Union; and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of the provision to declare."

Hamilton, in *The Federalist*, No. XXXIII:

"Within the legitimate scope of this grant, Congress is permitted to determine for itself what is necessary and what is proper. Ex parte Curtis (N.Y. 1882) 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232."

On this subject, 11 American Jurisprudence, Section 138 of Constitutional Law, beginning at page 804 reads as follows:

"One of the most firmly established groups of principles which has become cardinal and ele-

mentary in the field of constitutional law is that the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The Courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the Court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people, * * *."

III.

THE TENTH AMENDMENT DOES NOT LIMIT CONGRESS IN THE EXERCISE OF POWERS GRANTED IN ARTICLE I OF THE CONSTITUTION.

If the act is within the power confided to Congress the Tenth Amendment by its terms has no application since it only reserves to the United States powers not delegated to the United States by the Constitution. *Everard's Breweries v. Day*, 265 U. S. 545, 558.

The supremacy of the exercise of federal powers over the rights reserved to the states in all cases where exclusive powers are granted under the Constitution to the Federal Government is also clearly stated in the following cases:

United States v. Darby, 312 U.S. 100-124, 61 S.Ct. 451, 85 L.Ed. 609-22:

"From the beginning and for many years the (Tenth) Amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a

granted power which are appropriate and plainly adapted to the permitted end. *Martin v. Hunter*, 1 Wheat. (U.S.) 304, 324, 325, 4 L. Ed. 97, 102; *M'Culloch v. Maryland*, supra (4 Wheat. (U. S.) 405, 406, 4 L. Ed. 601); *Gordon v. United States*, 117 U. S. 697, 705, and 76 L. Ed. 1347, 1352; Lottery Case (*Champion v. Ames*) 188 U. S. 321, 47 L. Ed. 492, 23 S. Ct. 321, supra; *Northern Securities Co. v. United States*, supra (193 U. S. 344, 345, 48 L. Ed. 703, 704, 24 S. Ct. 436); *James Everard's Breweries v. Day*, supra (265 U. S. 558, 68 L. Ed. 1179, 44 S. Ct. 628); *United States v. Sprague*, 282 U. S. 716, 733, 75 L. Ed. 640, 644, 51 S. Ct. 220, 71 A. L. R. 1381; see *United States v. The Williams* (D. C.) Fed. Cas. No. 16,700. Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. See also *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330, 331, 80 L. Ed. 688, 702, 703, 56 S. Ct. 466; *Wright v. Union Cent. L. Ins. Co.*, 304 U. S. 502, 516, 82 L. Ed. 1490, 1500, 58 S. Ct. 1025, 36 Am. Bankr. Rep. (N.S.) 950."

United Public Workers v. Mitchell, 330 U. S. 75-96, 91 L. Ed. 754-70:

"The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the

Union is taken. If granted power is found, necessarily the objection of invasion of those rights reserved by the Ninth and Tenth Amendments must fail."

IV.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT LIMIT CONGRESS IN PROVIDING FOR FUTURE ACTION OR ESTABLISHING RIGHTS IN PROPERTY COMING INTO EXISTENCE AFTER THE ACT PASSED UNDER POWERS GRANTED IN ARTICLE I OF THE CONSTITUTION

A. In general.

Statutes enacted by Congress in exercise of the war power of the government are not affected by the restriction imposed by the Fifth Amendment and Sixth Amendment. (*Page ((Miller)) v. United States*, 11 Wall. 268, 304.)

Generally speaking, the right to enter into and carry out contracts in respect of one's property and private affairs is protected by the due process clause of the Fifth Amendment, but it is well established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the National Government was created. *Highland v. Russel Car & Snow Plow Co.*, 279 U. S. 253, 261.

The antitrust act was sustained as applied to prevent contracts in restraint of trade in the sale of pipes, the Court saying, "The power of Congress to

regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States." *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 229.

The Act of 1898 (30 Stat. 763) prohibiting advance of wages to seamen was sustained both under the commerce power and because of the special character of seamen's contracts. *Ellis v. United States*, 206 U. S. 246.

The Hepburn Act of 1906 (34 Stat. 584) prohibiting issue of free passes, was not unconstitutional even as applied to abolish rights under a prior agreement, by which a carrier agreed to issue such passes annually for life in settlement of a claim for personal injuries. *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467.

B. The only rights protected by the due process clause of the Fifth Amendment are vested rights and appellee's claimed rights in the case at bar are not vested.

"Rights are vested when the right to enjoyment has become the property of some particular person or persons as a present interest, independent of a contingency. Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future

benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right. So, inchoate rights which have not been acted on are not vested. Vested rights can arise only from contracts, from statutes, and from operation of law. A vested right can never obtain where its inception is procured by fraud." 16 Corpus Juris Secundum, p. 642, Sec. 215.

"While on the one hand, 'vested' has been said to have a well-understood meaning, and to have a proper legal meaning, like every other word, unless the context controls it, it has, on the other hand, been said to be a flexible word, and capable of bearing more than one meaning. It has been defined as accrued, fixed, settled, absolute, having the character or giving the rights of absolute ownership not contingent, not subject to be defeated by a condition precedent. Primarily, 'vested' is to be interpreted as meaning free from all contingency. In this sense, it is nearly equivalent to 'possessed'. However, the word is often used in a different sense from its technical or strictly legal meaning; thus 'vested' has been construed to mean not subject to be divested or indefeasible; transmissible. It has also been construed to mean payable. Originally, the word had reference only to real estate." 67 Corpus Juris p. 239, Sec. 2.

The state law under which appellee claims provides:

"The respective interest of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interest under the management and control

of the husband * * *." Civil Code of California, Sec. 161a.

Under the California law the husband can use the property in any way he desires so long as he does not make a gift of it and the wife cannot complain.

"It is no doubt the settled law of this state that, where the premiums on an insurance policy issued on the life of a husband after coverture are paid entirely from community funds, the policy is a community asset, and, in view of the provisions of section 172[11] of the Civil Code, the husband cannot make a valid gift thereof without the written consent of the wife; and that where the husband attempts to do so, by naming a third party as beneficiary, the transaction as to the wife's share is voidable and subject to her right of revocation. This principle, however, has no application to the facts of the instant case, inasmuch as there is evidence in the record tending to support the implied finding of the trial court that the designation of the respondent as beneficiary of the proceeds of the policy was made by the assured for a valuable consideration." *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 507.

"Section 172[12] of the Civil Code, while it does not specifically create a liability or an exemption for any particular type of community property, gives to the husband 'the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate'. It

[11] Appendix page xv.
[12] Appendix page xv.

reasonably follows from the express language above quoted that this section in effect subjects the entire community personalty (with the exception of the wife's earnings, Civ. Code, sec. 168) to any and all contracts of the husband, as well as to judgments arising out of his tort. Furthermore, since the only limitation upon the husband is to refrain from making a gift of such property without consideration, he is not prevented from paying it out in compromise or satisfaction of a tort claim, for payment of a tort claim is not payment without consideration. * * *"

"With reference to California legislation on the question or liability or exemption of property of the spouses for payment of obligations arising out of the husband's tort, the sole enactments are section 168, which exempts the wife's earnings (community property) from liability for debts of the husband, and section 171, which extends the same exemption in respect to the wife's separate property. It is significant to note that nothing is said in regard to the liability of the husband's separate property, the husband's earnings, or the balance of the community property (the wife's earnings excepted by Civ. Code, sec. 168) in regard to an obligation created by the husband's tort. From this silence of the legislature it logically can be inferred that it was thereby intended that the husband, as agent of the community, should retain the power to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift of the former without consideration. To hold that the husband could not subject

the community property to liability for his tort would be to hold that he could not manage and control the same." *Grolemund v. Cafferata*, 17 Cal. (2d) 679, 683, 684.

The insured was an officer in the United States Army at the time of applying for the insurance and presumably followed the usual method of paying the premiums on his insurance by an allotment from his pay.[13]

His wife certainly had no present right of enjoyment of this money. If he had lost it gambling or spent it sight seeing she would have had no recourse against anyone. Had his government paid him in government bonds similar to the form now issued and Major Wissner had had them issued in his name and his mother's, the California courts would have honored the contract and would not have claimed that the wife's interest was a vested one. *Conrad v. Conrad*, 66 Cal. App. (2d) 280, *Davies v. Beech*, 74 Cal. App. (2d) 304.

"Bonds or obligations of the United States.—All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the names of two persons as co-owners in the alternative, shall, upon the death of either of the registered co-owners, become the sole and absolute property of the surviving co-owner, unless the Federal laws under which such bonds or other obligations were issued or the regulations

[13]Act Oct. 8, 1940, c. 757, Title VI, Part I § 602m, 54 Stat. 1009, 38 U.S.C.A. Sec. 802m, Appendix page viii.

governing the issuance thereof, made pursuant to such laws, provide otherwise.

"All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the name of one person payable on death to a named survivor, shall, upon the death of the registered owner, become the sole and absolute property of the surviving beneficiary named therein, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.

"This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided." Civil Code of California, Sec. 704 (emphasis ours).

In *United States v. Williams*, 302 U. S. 46, this Court recognizes the right of a minor to drop his insurance policy in spite of a written agreement with his parents that the policy would be kept in force. Major Wissner, an adult, should certainly, therefore, have the correlative right—the right to leave his insurance to his parents.

By becoming members of the armed forces these men were emancipated from state laws and subject only to the laws of the United States. Williams was freed from the obligation under state law to spend his pay to buy insurance for his parents and Major Wissner was freed from the obligation under state law to give half of his insurance to his wife.

C. There are no vested interests in the proceeds of government life insurance except those created by and recognized in the contract between the United States and the assured.

This Court speaking through Justice Holmes in *White v. United States*, 270 U. S. 175, 180, supra, said:

> "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the government at considerable cost to itself, for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the government's hands to that extent no one else could complain. The only relations of contract were between the government and him. White's mother's interest at his death was vested only so far as he and the government had made it so, and was subject to any conditions upon which they might agree."

In *Von Der Lippi-Lipski v. U. S.*, 4 Fed. (2d) 168, supra, the Court said:

> "It has been held repeatedly that a beneficiary under such a contract of insurance did not have a vested interest in installments of insurance not accrued, and that such contract is not an ordinary contract of insurance, nor is it in the nature of a pension, but is rather of the character and nature of both. *It has also been held that*

the authority of the insured, expressly conferred by statute, to designate whomsoever he desired, within the permitted class, as beneficiary under such contract of insurance was effective, when exercised by the insured, as against those who would otherwise have been entitled to benefits thereunder." (Italics ours).

In *Sizemore v. Sizemore's Guardian*, 222 Ky. 713, 2 S.W. (2d) 395, the Court said:

(2) "It is insisted upon this appeal that the amendment to the statute after the death of the soldier violated the Fifth Amendment to the Constitution of the United States, in that it deprived appellant of her property without due process of law. The argument proceeds upon the theory that the designated beneficiary had a vested right to all of the insurance, which could not be affected by later legislation. The argument is unsound. The beneficiary has no vested right in the installments not due or paid. His right to receive further installments ended at the death of the beneficiary, and *Congress possessed the power to provide where the insurance money should go in every contingency. The interest of the beneficiary was vested only so far as the soldier and the government had made it so, and was subject to any conditions, upon which they might agree. Congress, in creating the right, could annex conditions, and the beneficiary took the right subject to the conditions. White v. U.S.* 270 U.S. 175, 46 S.Ct. 274, 70 L. Ed. 530 annotated; *Helmholz v. Horst* (C.C.A.), 294 F. 417; *Cassarello v. U.S.* (D.C.), 271 F. 486, affirmed (C.C.A.) 279 F. 396; *Gilman v. U. S.* (D.C.), 300

F. 764, affirmed (C.C.A.), 300 F. 767; *Sutton's Ex'r. v. Barr's Adm'r*, 219 Ky. 543, 293 S.W. 1075." (Italics ours).

The following cases contain express statements to the same effect:

Bradley v. United States (1944; C.C.A. 10th Okla.), 143 F. (2d) 573 (cert. den. (1945), 323 U.S. 793, 89 L. Ed. 632, 65 S. Ct. 429);

Woods v. United States (1947; D.C. Ala.), 69 Fed. Supp. 760;

Lincoln Bank & T. Co. v. United States (1947; D.C. Ky.), 71 Fed. Supp. 745;

Dodd v. United States (1948; D.C. Ark.), 76 Fed. Supp. 991;

Citron v. United States (1947; D.C. Dist. Col.), 69 Fed. Supp. 830;

Owens v. Owens (1947), 305 Ky. 460, 204 S.W. (2d) 580.

V.

THE NATIONAL SERVICE LIFE INSURANCE ACT SHOWS AN INTENTION BY THE CONGRESS TO PROVIDE A COMPLETE AND UNIFORM SYSTEM OF INSURANCE FOR ALL MEMBERS OF THE ARMED FORCES.

An examination of the National Service Life Insurance Act of 1940 and its amendments shows that it was the intention of the Congress to control all of the essential incidents of the contract and to give the same rights and privileges to policy holders in every state.

Among other things the act provides:

(a) Insurance shall be granted by the United States to persons on active service.[14]

(b) A person who dies within 120 days of entering active service without having insurance in effect in the amount of $5000 shall be deemed to have applied for and been granted insurance in the sum of $5000, to be paid to a restricted group of beneficiaries.[15]

(c) There are similar provisions for persons totally disabled for six months or more.[16]

(d) Premium rates shall be based on the American Experience Table of Mortality and interest at three (3%) per cent per annum.[17]

(e) Insurance shall be issued on the five year level premium term plan with privilege of conversion on any date of premium payment to relate back to date of original issue.[18]

(f) "The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person *in loco parentis*

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[14]National Service Life Insurance Act of 1940, Oct. 8, 1940, Chap. 757, Title VI, Part I, Sec. 602(a) (54 Stat. 1009), 38 U.S.C.A. Sec. 802 (a), Appendix page iii.

[15]54 Stat. 1009, 38 U.S.C.A. Sec. 802 (d) (2), Appendix page iii.

[16]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (d) (3)), Appendix page iv.

[17]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (e)), Appendix page v.

[18]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (f)), Appendix page v.

if designated as beneficiary by the insured), brother or sister of the insured. *The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided,*"[19] (Emphasis ours).

(g) Payments to beneficiaries shall be in installments and shall be based on the age of the beneficiaries at date of death of insured and in the event of the death of the beneficiaries unpaid installments shall be paid to other beneficiaries named in the act and not to the estate of named beneficiaries.[20]

(h) If no beneficiary is designated or if the designated beneficiary does not survive the insured payments shall be made to beneficiaries specified in the act.[21]

(i) "The right of any beneficiary to payment of any installment shall be conditioned upon his or her being alive to receive such payments."[22]

(j) "*No person shall have a vested right to any installment or installments of any such insurance* and any installments not paid to a beneficiary during such

[19]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (g)). Appendix page vi.
[20]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (h)). Appendix page vi.
[21]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (i)). Appendix page vii.
[22]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (j)). Appendix page vii.

beneficiary's lifetime shall be paid to the beneficiary * * *"[23] provided for in the act. (Italics ours).

(k) "No installments shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made."[24]

(l) The administrator shall prescribe time and method of making payments which may at the election of the insured be deducted from his active service pay.[25]

(m) The amount of the first premium may be advanced from current appropriations for active service pay.[26]

(n) Premiums may be waived during total disability.[27]

(o) Sums necessary to carry out the provisions of the act are appropriated from money in the treasury not otherwise appropriated.[28]

(p) Payments shall be made upon awards by the Administrator.[29]

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[23]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (i)), Appendix page vii.
[24]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (j)), Appendix page viii.
[25]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (m)), Appendix page viii.
[26]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (m)), Appendix page viii.
[27]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (n)), Appendix page ix.
[28]54 Stat. 1011 (38 U.S.C.A. Sec. 804), Appendix page x.
[29]54 Stat. 1011 (38 U.S.C.A. Sec. 804), Appendix page x.

(q) A permanent trust fund is established in the Treasury.[30]

(r) The United States shall bear the cost of administration.[31]

(s) The United States shall pay costs of excess mortality and waiver of premiums due to disability.[32]

(t) The Administrator shall execute the provisions of the act, make rules and decide all questions.[33]

(u) The decision of the Administrator shall be final, except in the event of suit as provided in the act.[34]

(v) No State law providing for presumption of death shall be applicable.[35]

(w) Provisions of various sections of World War Veterans Acts shall apply including Sec. 3, 49 Stat. 609, 38 U.S.C.A. Sec. 454a.[36]

(x) Payments of benefits due or to become due shall not be assignable.[37]

(y) Payments made to, or on account of, a beneficiary:

(1) Shall be exempt from taxation.

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[30]54 Stat. 1012 (38 U.S.C.A. Sec. 805 (a)), Appendix page x.
[31]54 Stat. 1012 (38 U.S.C.A. Sec. 806), Appendix page xi.
[32]54 Stat. 1012 (38 U.S.C.A. Sec. 807 (a) (b) (c)), Appendix page xii.
[33]54 Stat. 1012 (38 U.S.C.A. Sec. 808), Appendix page xiii.
[34]54 Stat. 1012 (38 U.S.C.A. Sec. 808), Appendix page xiii.
[35]54 Stat. 1013 (38 U.S.C.A. Sec. 810), Appendix page xiii.
[36]54 Stat. 1014 (38 U.S.C.A. Sec. 816), Appendix page xiv.
[37]Sec. 3, 49 Stat. 609 (38 U.S.C.A. Sec. 454a), Appendix page ii.

(2) Shall be exempt from the claims of creditors.

(3) Shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.[37]

(z) In the event of a disagreement as to a claim under the act, suit may be brought in any federal district court and all persons claiming any rights in the proceeds may be interpleaded.[38]

VI.

A NATIONAL SERVICE LIFE INSURANCE POLICY BEING A CONTRACT OF THE UNITED STATES IS NOT SUBJECT TO STATE LAW.

A. Generally.

Government insurance contracts are contracts of the United States (*Lynch v. United States*, 292 U.S. 571), and their construction presents questions of Federal law not controlled by the law of any State. *Woodward v. United States*, 167 F. (2d) 774 (C.C.A. 8th); *Cassarello v. United States*, 271 Fed. 486 (M. D. Pa.), affirmed, 279 Fed. 396 (C.C.A. 3d); *United States v. County of Allegheny*, 322 U.S. 174, 183; *Clearfield Trust Co. v. United States*, 318 U.S. 363. As stated in *Woodward v. United States*, 167 Fed. (2d) 774:

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[37]Sec. 19, 43 Stat. 612 (38 U.S.C.A. Sec. 445), made applicable by 54 Stat. 1014 (38 U.S.C.A. Sec. 817). Appendix pages i and xiv.

"Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts. Lynch v. United States, 292 U.S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434. The validity and construction of such policies present questions of federal law. Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 S. Ct. 573, 87 L.Ed. 838; United States v. County of Allegheny, 322 U.S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209."

See also dicta in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 79.

National Service Life Insurance contracts being authorized by the National Service Life Insurance Act of 1940, the provisions of that Act, as amended, govern the designation of beneficiaries and payment of insurance proceeds thereunder, and are not subject to and may not be controlled, modified or changed by the community property laws of the State of California. *Barton v. United States*, 75 Fed. Supp. 703 (S.D. Calif.); *Johnson v. Shelton*, Memorandum Ruling No. 522,648 (Superior Court of State of California, County of Los Angeles) (Appendix pp. 16-20 Statement as to Jurisdiction). In the *Barton* case, the Court said (pp. 705, 706):

"Whether state law can control disposition of proceeds of policies issued pursuant to the National Service Life Insurance Act of 1940, 38 U.S.C.A., Secs. 801-818, depends upon the intent of Congress; for it is clear that the Act, being a constitutional exercise of powers granted to

Congress, * * * is 'Supreme Law of the Land' * * * if Congress so willed. * * *

* * * * * * *

"I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A., Secs. 801-818. It follows then that California's Community property law, (Cal. Civ. Code, Sec. 164), can confer no right on plaintiff to share in the proceeds of the policy at bar.

"My learned colleague Judge Harrison so held with respect to the community property law of Texas in James v. United States, et al., D.C., S. D. Cal. 1947. (Appendix C pp. 20-24 Statement as to Jurisdiction.)"

Also as stated in *Johnson v. Shelton*, supra:

"In the case before us the policy of insurance was issued by the Federal Government pursuant to a Congressional act. To the extent then that any State law conflicts with this act of Congress it is of necessity void and of no effect. * * *"

Similar rulings have been rendered without opinions by United States District Judge Ben Harrison, in *James v. United States, et al.* No. 6061-BH, on June 16, 1947, (Appendix C. pp. 20-24 Statement as to Jurisdiction) and also in *Pack v. Pack*, No. 7651 BH; by Judge Campbell E. Beaumont in *Rhodes v. United States et al.* No. 5845-B, and by Judge Jacob Weinberger, in *Hayek v. Hayek and United States*, No. 7400-W, all decided in the District Court of the

United States for the Southern District of California; and by the Superior Court of the State of California in and for the County of Los Angeles, in *Nobles v. Cannell*, No. 502,587 (Appendix p. xxiii, Appellant's Brief in Opposition to Motion of Appellee for Affirmation of Judgment of State Court and Dismissal of Appeal). There are no Federal Court decisions to the contrary of which we are aware.

When the *Pack* case was appealed, 176 Fed. (2d) 770, the Court refused to pass on the question involved in the case at bar. It affirmed the judgment of the lower court so far as the United States was concerned but held that the provisions of the Act as to settlement of claims did not authorize the Federal District Court to determine the controversy between the widow and her deceased husband's mother.

We believe the court was painfully aware of the doctrine of comity and being unable to conscientiously agree with the lower court in the case at bar avoided the issue by deciding the case before it on another ground.

B. Federal law controls payment of the proceeds of a National Service Life Insurance policy.

Under the provisions of Section 602 (g) (38 U.S. C.A. Sec. 802 (g)), the insured had the right to designate the beneficiary of his National Service Life Insurance contract within a restricted class of beneficiaries, and the right to change the beneficiary, without the beneficiary's consent. The section reads as follows:

"(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: * * *"

This was one of the important provisions of the contract[39] which the insured entered into with the United States when he applied for National Service Life Insurance, and without any change having been made during his lifetime controls the payment of insurance benefits.

Under Government insurance contracts, the only relations of contract are between the Government and the insured, the beneficiary being a volunteer. *White v. United States*, 270 U.S. 175, supra; *Von Der Lippi-Lipski v. United States*, 4 F. (2d) 168 (App. D.C.) infra; *United States v. Sterling*, 12 F. (2d) 921 (C.C.A. 2) infra. As stated in *White v. United States*, supra (pp. 180-181):

"The only relations of contract were between the Government and him. White's mother's in-

[39]The contract provisions are found in the Act, the amendments thereto and the regulations promulgated thereunder. *White v. United States*, 270 U.S. 175; *Lynch v. United States*, 292 U.S. 571; *Wilner v. United States*, 292 U.S. 571.

terest at his death *was vested* only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more. See Helmholz v. United States, 294 Fed. 422, affirming 290 Fed. 614." (Emphasis ours.)

Appellee, who admittedly was not designated as beneficiary, had no relations of contract with the Government and could occupy no better position than the named beneficiary.

So in *Washburn v. United States*, 63 Fed. Supp. 224, where the proceeds were payable to the wife as primary beneficiary and the sister of the insured as contingent beneficiary and the wife died leaving a son shortly after the insured died the Court said:

"It will not be disputed, I am sure, that it is a well established principle of law that where a beneficiary survives the insured, however short the length of time may be between the death of the insured and that of the beneficiary, the rights of a 'contingent' beneficiary are lost, and that upon the death of the insured, the benefits immediately become due to the surviving principal beneficiary. (Citing cases.)

"With that principle of law in mind, if the facts in this case had arisen under an ordinary life insurance policy, there could be no question but that immediately upon the death of the insured, the right to the insurance would have vested in the 'principal' beneficiary, his wife, and that

the 'contingent' beneficiary would have acquired no interest in the benefits, *but in this case the insurance was provided for by a special Act of Congress, for those in the Armed Forces, and we must find the answers to our questions within the Act itself.*" (Italics ours.)

The Court then holds that the sister, the "contingent" beneficiary, is entitled to the insurance in spite of the state rule of law to the contrary.

Similarly a State Court consent decree is invalid as a violation of the federal act prohibiting assignments, *Robertson v. McSpadden*, 46 Fed. (2d) 702. An agreement to divide the proceeds is invalid. *Von Der Lippi-Lipski v. United States*, 4 Fed. (2d) 168; *Lewis v. United States*, 56 Fed. (2d) 563; *Murphy v. United States*, 5 Fed. Supp. 583, where the Court said:

"(3) Plaintiff's second ground of recovery appears to resolve itself into a *pure question of law*. He testified that, after his son's term insurance had expired for the non-payment of premiums, he furnished money for it to be reinstated, and that he had paid the premiums on the life insurance policy since it was issued. There is conflicting testimony as to whether or not such was the fact. It is not necessary for me to make a finding one way or the other in order to determine plaintiff's right in this case. Whether or not the father may *prove a claim against his son's estate* for money so expended is a question for the state Court. *An agreement not to change beneficiary in a war risk policy in consideration of money advanced to insured by beneficiary is invalid.*" (Italics ours.)

A gift of the policy followed by payment of the premiums by the donee does not prevent a change in beneficiary by the insured and the new beneficiary is entitled to the proceeds as against the donee. *United States v. Sterling*, 12 Fed. (2d) 921; *Tompkins v. Tompkins*, 132 N.J.L. 217, 38 Atl. (2d) 890.

C. Federal law protects the named beneficiary in the use of the proceeds although state rules of law would authorize others to take the proceeds from the named beneficiary.

The provisions of the federal act directly involved in this case are found in Section 3, 49 Statutes 609, 38 U.S.C.A., Section 454 A, Act of August 12, 1934, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary". (Emphasis ours.)

The provisions of this section against assignments have been upheld in *Robertson v. McSpadden*, supra; *Bradley v. United States*, supra; *Von Der Lippi-Lipski v. United States*, supra; *Lewis v. United States*, supra; *Murphy v. United States*, supra; *United States v. Sterling*, supra; *Tompkins v. Tompkins*, supra; and *Kauffman v. Kauffman*, 93 A.C.A. 966, ... Pac. .....

The provisions of this section exempting the proceeds from taxation were upheld in *Lawrence v. Shaw*,

300 U.S. 245, and considered not applicable to the situation presented in *United States Trust Co. of New York v. Helvering*, 307 U.S. 57.

The exemption from the claims of creditors was followed in *Culp v. Webster*, 25 Cal. App. (2d) Supp. 759, 70 P. (2d) 273. In *Pagel v. Pagel*, 291 U.S. 473, it was held under the previous wording of this section that this exemption did not extend to the funds after they became a part of the estate of the assured and the Congress immediately thereafter broadened the language to cover that situation. *In re McCormick's Estate*, 8 N.Y.S. (2d) 179, 185-188, *Haley v. United States*, 46 F. Supp. 4, 7. See also *Carrier v. Bryant*, 306 U.S. 545, 548.

VII.

THE CONGRESS HAS CLEARLY EXPRESSED ITS INTENTION THAT THE DEAD SOLDIER'S WISHES SHALL BE RESPECTED AND THE BENEFICARY WHOM HE NAMES SHALL BE PROTECTED IN THE USE OF THE PROCEEDS OF THE INSURANCE ON HIS LIFE.

We are determining the right of a deceased veteran to leave the proceeds of his insurance to his mother and father rather than to his widow from whom he was estranged. (Tr. 21.) We are interpreting a contract between the veteran and his government.

The terms of the contract are contained in acts of the Congress and regulations promulgated thereunder. *White v. United States*, 270 U.S. 175; *Lynch v. United States*, 292 U.S. 571; *Wilner v. United States*, 292 U.S. 571.

These acts provide: "The insured shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries." (National Service Life Insurance Act of 1940, Section 602 (g), 38 U.S.C.A. Sec. 802 (g)).

The Courts in determining the beneficiary have carried out the intention of the assured and have ignored formalities to do so. *Mitchell v. United States* (C.C.A. 5, 1948), 165 Fed. (2d) 758, 2 A.L.R. (2d) 484 annotated.

The annotater at 2 A.L.R. (2d) 494 says:

> "All the cases agree that the controlling feature as to the effectiveness of a change of beneficiary by the insured under a policy of national service life insurance is the real intention of the insured with regard to such change, as against failure to comply with all the formalities for making his purpose effective.
>
> "Thus, it was said in Woods v. United States (1947; D.C. Ala.) 69 F. Supp. 760, that the intention of the deceased soldier should, if it can reasonably be done, be given effect by the courts, and substance rather than form should be the basis of the decisions of the courts.
>
> "Similarly, it was said in Citron v. United States (1947; D.C. Dist. Col.) 69 F. Supp. 830, that it is an avowed purpose of the law that the intention of a soldier with respect to the designation of a beneficiary of insurance shall be ascertained and carried into effect.

"Another formulation of the same basic principle is the statement frequently found in the decisions that the courts will brush aside all legal technicalities in order to effectuate the manifest intention of the insured. This language was used in the following cases: Bradley v. United States (1944; C.C.A. 10th Okla.) 143 F. (2d) 573 (cert. den. (1945) 323 U.S. 793, 89 L. ed. 632, 65 S. Ct. 429); Roberts v. United States (1946; C.C.A. 4th Va.) 157 F. (2d) 906 (cert. den. Roberts v. Roberts (1947) 330 U.S. 829, 91 L. ed. 1278, 67 S. Ct. 870); Collins v. United States (1947; C.C.A. 10th Okla.), 161 F. (2d) 64 (cert. den. (1947) 331 U.S. 859, 91 L. ed. 1866, 67 S. Ct. 1756); Mitchell v. United States (1948; C.C.A. 5th La.) 165 F. (2d) 758, 2 A.L.R. (2d) 484; Woods v. United States (1947; D.C. Ala.) 69 F. Supp. 760; Rutledge v. United States (1947; D.C. La.) 72 F. Supp. 352 (aff'd Mitchell v. United States (1948; C.C.A. 5th), 165 F. (2d) 758, 2 A.L.R. (2d) 484)."

The insured in the case at bar designated his parents as beneficiaries and wanted them to have the benefits from the insurance on his life. (Tr. 3.)

The Act also provides:

"Payments of benefits * * * made to * * * a beneficiary * * * shall be exempt from taxation, shall be exempt from the claims of creditors, *and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."[40] (Emphasis ours.)

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[40]Sec. 3, 49 Stat. 609 (38 U.S.C.A. Sec. 454A), Act of August 12, 1934, Chapter 10. Made applicable to National Service Life Insurance by Sec. 617, Act of Oct. 8, 1940, 54 Stat. 1014 (38 U.S. C.A. Sec. 817), Appendix pages ii and xiv.

Under the well known rule of statutory construction every word and phrase must be given some useful meaning if that is possible. When the statute says that "payments made to a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, *and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever", the words "*and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever" add new exemptions to the exemptions from taxation and the claims of creditors already stated.

Congress intended a veteran to have the right to say to whom the proceeds of his insurance should be paid and that that person should be able to use those proceeds free from taxation, free from the claims of creditors, *and* free from the claims of any other person such as a wife from whom he was estranged.

The only claims that could be made against proceeds of an insurance policy are claims of the state by taxation, claims of creditors *and* claims of relatives by blood or marriage. The Congress said that none of these claims could be asserted either before or *after* receipt of the payments by the beneficiary.

The Court below being unable to avoid the clear meaning of the language used and being otherwise unable to avoid the intention of the Congress and the deceased soldier and to apply the state rules of community property rather than the rules in the federal statute as required by the supremacy clause of the United States Constitution[1] held the Act of Con-

[1] United States Constitution, Article VI, paragraph 2.

gress unconstitutional and thereby deprived appellants of their property without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

CONCLUSION.

Among the powers delegated to the Congress by the people in the Constitution of the United States are the powers to provide for the common defense and general welfare of the United States, to raise and support armies, to provide and maintain a Navy and to make rules and regulations for the governing and regulation of the land and naval forces. The Congress is also given the power to make all laws which shall be necessary and proper for carrying into execution the previously, expressly granted powers. This necessary and proper clause is not a limitation on the exercise of the expressly delegated powers but is a further grant of power. An Act of the Congress passed pursuant to expressly delegated powers is not in violation of the Tenth Amendment or the due process clause of the Fifth Amendment but becomes the supreme law of the land and the judges in the courts of every state are bound thereby.

The constitutionality of the provisions of the National Service Life Insurance Act of 1940, involved in this case, have been sustained against every attack that has been made on them in every reported case of which we have knowledge, except the case at bar.

There is a conflict between the State and Federal courts sitting in the State and between the lower

Court and the Courts in other states and Federal jurisdiction which can only be resolved by decision of this Court.

The question is a novel one so far as this Court is concerned. It is one of great importance to thousands of people. The possibilities of increase in litigation, if the judgment of the lower Court is not reversed, are tremendous. This Court has jurisdiction, both certiorari and by appeal.

The provisions of the Act indicate an intention by the Congress to establish a uniform system of insurance completely covering the area of the controversy in the case at bar in words whose meaning, as applied to the facts in this case, cannot be questioned. The action of the lower Court in applying state rules of law instead of the applicable rules of the Federal statute in conflict therewith has deprived appellants of their property without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution, for which action the judgment of the lower Court should be reversed and appellants awarded their costs incurred.

Dated, Modesto, California,
November 18, 1949.

Respectfully submitted,

W. Coburn Cook,
Vernon F. Gant,
Carlos J. Badger,
Counsel for Appellants.

(Appendix Follows.)

STATUTES

Pensions, Bonuses, Veteran's Relief.

38 U.S.C.A. Sec. 445. "Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions.

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Veterans' Administration acknowledges the indebtedness of the United States upon any such contract of insurance and there is a

dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought by the Veterans' Administration in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside: * * *

The term 'claim', as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter. June 7, 1924, c. 320, 19, 43 Stat. 612; Mar. 4, 1925, c. 553, 2, 43 Stat. 1302; May 29, 1928, c. 875, 1, 45 Stat. 964; July 3, 1930, c. 849, 4, 46 Stat. 992; July 3, 1930, c. 863, 1, 2, 46 Stat. 1016; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921."

38 U.S.C.A. 454a. "Assignability and exempt status of payments of benefits.

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relat-

ing to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. * * * *Provided further*, That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title. Aug. 12, 1935, c. 510, 3, 49 Stat. 609; Oct. 17, 1940, c. 893, 5, 54 Stat. 1195, as amended."

38 U.S.C.A. 802. "Persons insurable; premiums; type of insurance; benefits and beneficiaries; effective date and amount of insurance—Persons entitled to insurance; persons entering service.

"(a) Every person who is commissioned and hereafter ordered into, or who is hereafter examined, accepted, and enrolled in, the active service and while in such active service shall, upon application in writing (made within one hundred and twenty days after entrance into such active service) and payment of premiums as hereinafter provided and without further medical examination, be granted insurance on the five-year-level premium term plan by the United States against the death of such person occurring while such insurance is in force.

"(d) (2) Any person in the active service on or after October 8, 1940, who, while in such service and before the expiration of one hundred and twenty days after December 20, 1941, dies or has died in line of duty (including death resulting from disease or injury incurred in line of duty), without having in force

at the time of such death insurance under sections 287, 357, 502, and 575 of this title, chapter 10 of this title, or this chapter, in the aggregate amount of at least $5,000, shall be deemed to have applied for and to have been granted insurance as of the date of entry into active service or October 8, 1940, whichever is later, in the sum of $5,000 payable as provided in section 802 (h), except that payments hereunder shall be made only to the following beneficiaries and in the order named—

(A) to the widow or widower of the insured, if living and while unremarried;

(B) if no widow or widower entitled thereto, to the child or children of the insured, if living, in equal shares;

(C) if no widow or widower entitled thereto, or child, to the dependent mother or father of the insured, if living, in equal shares.

"(d) (3) Any person in the active service on or after October 8, 1940, who, while in such service and before the expiration of one hundred and twenty days after December 20, 1941, suffers in line of duty total disability continuously for six months or more without having in force at the time of such disability insurance under sections 287, 357, 502, and 575 of this title, chapter 10 of this title, or this chapter, in the aggregate amount of at least $5,000, shall be deemed to have applied for and to have been granted insurance in the aggregate sum of $5,000 effective as of the date such disability was so suffered but not

prior to October 8, 1940. Such premiums shall be waived during the continuation of such total disability. The Administrator is authorized and directed to transfer from the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to cover all losses incurred and premiums waived under paragraphs (2) and (3) of this subsection.

"(e) The premium rates for such insurance shall be the net rates based upon the American Experience Table of Mortality and interest at the rate of 3 per centum per annum. All cash, loan, paid up, and extended values, and all other calculations in connection with such insurance, shall be based upon said American Experience Table of Mortality and interest at the rate of 3 per centum per annum.

"(f) Such insurance shall be issued upon the five-year level premium term plan, with the privilege of conversion as of the date when any premium becomes or has become due, or exchange as of the date of the original policy, upon payment of the difference in reserve, at any time after such policy has been in effect for one year and within the five-year term period, to policies of insurance upon the following plans: Ordinary life, twenty payment life, thirty payment life. All five-year level premium term policies shall cease and terminate at the expiration of the five-year term period. Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable

and practicable, may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

"(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.

"(h) Such insurance shall be payable in the following manner:

(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.

(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of naturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary.

(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be

paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—

(A) to the widow or widower of the insured, if living;

(B) if no widow or widower, to the child or children of the insured, if living, in equal shares;

(C) if no widow, widower, or child, to the parent or parents of the insured, if living, in equal shares;

(D) if no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares.

"(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordance with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the per-

mitted class next entitled to priority, as provided in subsection (h).

"(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made.

"(m) The Administrator shall, by regulations, prescribe the time and method of payment of the premiums on such insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from his active service pay or be otherwise made: *Provided,* That an amount equal to the first premium due under a national service life-insurance policy may be advanced from current appropriations for active service pay to any person in the active service in the Army, Navy, Marine Corps, or Coast Guard, which amount shall constitute a lien upon any service or other pay accruing to the person for whom such advance was made and shall be collected therefrom if not otherwise paid: *Provided further,* That no disbursing or certifying officer shall be responsible for any loss incurred by reason of the advance herein authorized: *And provided further,* That any amount so advanced in excess of available service or other pay shall constitute a lien on the policy within the provisions of section 454a of this title.

"(n) Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during continuous total disability of the insured which commenced subsequent to the effective date of such insurance and which has existed for six consecutive months or more prior to the attainment by the insured of the age of sixty years, effective as of the due date of the monthly premium becoming payable on or after the first day of the seventh consecutive month of such disability: *Provided*, That application for waiver is made while the insurance is currently kept in force by the payment of premiums, and the insured furnishes proof satisfactory to the Administrator showing that he is and has been continuously totally disabled for six or more months prior to attaining sixty years of age. Any waiver granted by the Administrator under this subsection shall not become effective prior to the date of application therefor; except that, in the discretion of the Administrator, it may be made effective at any time within a period of not more than six months prior to such date but in no event prior to the first day of the seventh month of such continuous disability. Any premiums tendered to cover a period during which such waiver is effective shall be refunded. The Administrator shall provide by regulations for reexaminations of beneficiaries under this subsection and, in the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of

insurance may be continued by payment of premiums as provided in said policy. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof."

804. Appropriations for payment of liabilities; payments from.

"There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this chapter, to be known as the National Service Life Insurance appropriation, for the payment of liabilities under National Service Life Insurance. Payments from this appropriation shall be made upon and in accordance with awards by the Administrator." Oct. 8, 1940, 11 P.M., E.S.T. c. 757, Title VI, Part I, Sec. 604, 54 Stat. 1011."

805. National Service Life Insurance Fund; creation; payments into and from; reserves; investments.

(a). "There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments

from this fund shall be made upon and in accordance with awards by the Administrator.

(b). "The Administrator is authorized to set aside out of such fund such reserve amounts as may be required under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest such fund, or any part thereof, in interest-bearing obligations of the United States or in obligations guaranteed as to principal and interest by the United States, and to sell such obligations for the purposes of such fund. Oct. 8, 1940, 11 p.m. E.S.T., c. 757, Title VI, Part I, Sec. 605, 54 Stat. 1012.

806. Administrative costs.

"The United States shall bear the cost of administration in connection with this chapter, including expenses for medical examinations, printing and binding, and for such other expenditures as are necessary in the discretion of the Administrator. The appropriations made for the Veterans' Administration for the fiscal year 1941 for administrative expenses shall be available for the payment of such costs of administration under this chapter. Oct. 8, 1940, 11 p.m. E.S.T., c. 757, Title VI, Part I, Sec. 606, 54 Stat. 1012."

807. Costs of excess mortality and premium waiver; liability for benefits for death resulting from extra hazard of military or naval service.

(a) The United States shall bear the excess mortality cost and the cost of waiver of premiums on account total disability traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator.

(b) Whenever benefits under such insurance become payable because of the death of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the liability for payment of such benefits shall be borne by the United States in an amount which, when added to the reserve of the policy at the time of death of the insured, will equal the then value of such benefits under such policy. The Administrator is authorized and directed to transfer from time to time the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to carry out the provisions of this section.

(c) Whenever the premiums under such insurance are waived as provided in section 802(n) because of the total disability of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the premiums so waived shall be paid by the United States and the Administrator is authorized and directed to transfer from time to time an amount equal to the amount of such premiums from the National Service Life Insurance appropriation to the National Service Life

Insurance Fund. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 607, 54 Stat. 1012."

808. General administrative provisions.

"The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this chapter, shall have the power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this chapter as may be assigned to them by the Administrator. All official acts performed by such officers or employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. Except in the event of suit as provided in section 817 hereof, all decisions rendered by the Administrator under the provisions of this chapter, or regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by motion or otherwise any such decision. Oct. 8, 1940, 11 p.m., E.S.T., C. 757, Title VI, Part I, Sec. 608, 54 Stat. 1012."

810. Establishment of death: presumptions.

"No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Ad-

ministrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may for the purposes of this chapter, be considered as sufficiently proved. Oct. 8, 1940, 11 p.m., E.S.T., c 757, Title VI, Part I, Sec. 610, 54 Stat. 1013."

816. Application of other laws.

"The provisions of sections 101-104, 131-134, 450, 454a, and 556a of this title, insofar as they are applicable, shall apply to the provisions of this chapter. Oct. 8, 1940, 11 p.m., E.S.T., c 757, Title VI, Part I, Sec. 616, 54 Stat. 1014."

817. Suits in event of disagreement as to claims.

"In the event of a disagreement as to claim arising under this chapter, suit may be brought in the manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 445 and 551 of this title, as amended: *Provided*, That in any such suit the decision of the Administrator as to waiver or non-waiver of premiums under section 802(n) shall be conclusive and binding on the court. Oct. 8, 1940, 11 p.m., E.S.T., c 757, Title VI, Part I, sec. 617, 54 Stat. 1014."

818. Short title.

"This chapter may be cited as the 'National Service Life Insurance Act of 1940.' Oct. 8, 1940, 11 p.m.

E.S.T., c 757, Title VI, Part I, Sec. 618, 54 Stat. 1014."

Civil Code of California

Sec. 172. Management of community personal property. "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.—1917:829."

Sec. 172a. Management of community real property. *Limitation of actions.* "The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a

lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.—1927:827."

Statement Opposing Jurisdiction and Motion to Dismiss or Affirm

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET V. WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

LESLIE A. CLEARY,
Attorney for Appellee.

CLEARY AND ZEPP,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
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vs.

MARGARET V. WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

STATEMENT DISCLOSING MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THIS COURT ASSERTED BY APPELLANTS

Comes now Margaret V. Wissner, appellee herein and, in accordance with the provisions of paragraph 3, rule 12 of the rules of the Supreme Court of the United States, presents her typewritten statement disclosing matters and grounds making against the jurisdiction of this Court asserted by the appellants and files her motion to affirm the judgment and final decision of the California District Court of Appeal, Third Appellate District and the judgment

and final decision of the Supreme Court of the State of California denying a hearing after decision in the Appellate Court.

I

Facts

The facts to be considered in this matter are established by the findings of fact made and filed by the Honorable B. C. Hawkins, Judge of the Superior Court of the State of California in and for the County of Stanislaus at the close of the trial of said action in said court.

A summary of the pertinent facts therein found by the judge of the lower court is as follows:

a. Margaret V. Wissner and Leonard O. Wissner were married in the State of California on August 16, 1930, and continued as husband and wife and continued at all times as residents of and domiciled in the State of California up to the date of death of the said Leonard O. Wissner.

b. Leonard O. Wissner died testate while serving as a major in the United States Army on November 14, 1945.

c. During service, Leonard O. Wissner purchased from the United States government a national service life insurance policy in the principal sum of $10,000.00, which policy matured and was payable on his death on November 14, 1945; that the appellee did not, at the time of the purchase of said policy nor any time prior to his death, know that the said Leonard O. Wissner had named anyone other than herself as beneficiary and that she, the said appellee, did not at any time consent to the naming of anyone but herself as beneficiary under said policy and that said appellee did not, at any time, consent to the application or use of community funds to or for the payments of premiums on said insurance policy and that the naming of said ap-

pellants and each thereof as beneficiaries under said policy was without consideration.

d. That at the time of the issuance of the said policy of insurance to said Leonard O. Wissner and during all of the time thereafter up to the time of his death, he and the appellee, Margaret V. Wissner were both, at all times, legal residents and domiciled in the State of California; that the premiums on said insurance policy and the whole thereof were paid from the earnings of the said Leonard O. Wissner and the earnings of the said Leonard O. Wissner, from which said premiums were paid, were the community property of Leonard O. Wissner and Margaret V. Wissner, his wife, appellee herein.

e. That the proceeds of said insurance policy were and are the community property of appellee Margaret V. Wissner and the deceased Leonard O. Wissner.

All of the above stated facts will be found in the findings of the court—C. T. page 30, line 17 to C. T. page 32, line 5.

f. That the said policy of insurance was paid for with the community property of appellee and the deceased, Leonard O. Wissner, is alleged in the original complaint (C. T. page 5, line 2 to 8) and is admitted by the answer of the appellants (C. T. page 18, lines 10 to 25). It will be noted that in the answer of appellants they allege only that the premiums were paid from the pay of the deceased as an officer in the army, making no denial of the allegation of the appellee, in her complaint, that the earnings were community property.

II

The United States Was Not a Party to This Case, Was Not Affected by the Decision and Has No Interest in It

a. United States not a party: It seems advisable that we should call attention, very specifically, to the fact that this

case differs from all others that have been under consideration by any court of last resort or any of the lower Federal courts.

In all such previous cases the suit has included the United States or a Federal official or department as a defendant.

In this case we have always taken the position that State courts cannot interfere with the acts of the veterans' bureau or any official of the United States government in connection with the insurance program.

Our position in this case, which sets it wholly and completely apart from the contentions made in all other cases reviewed in the higher courts, is that a State court cannot interfere with the carrying out of the veterans' insurance program to the full measure as provided by the Congressional Act, but that this does not preclude the State court from entertaining litigation between citizens of the State over the proceeds of a veteran's insurance policy after they are in the hands of the beneficiary unless such litigation concerns some specific exemption set forth in the Congressional Act.

b. United States not affected by the decision: The Congressional Act setting up the veterans' insurance program has for its purpose the protection of the veteran throughout his lifetime and after his death. Every act necessary to be performed by any representative of the government can be performed without embarrassment, hindrance or difficulty under the decision appealed from. The purposes of the Act can be and will be fully and completely carried out in accordance with the language of the Act under this decision.

A holding contrary to the decision approved by the Appellate Court and the Supreme Court of the State of California would require reading into the Act language which is not there.

c. United States not interested in this litigation: This decision of the California Appellate and Supreme Courts deals only with the rights of the state courts to settle disputes with reference to insurance benefits paid to the beneficiary concerning matters not specifically exempted under the Congressional Act and recognizes fully the fact that Federal agencies cannot be interfered with in completing all their duties up to and including the payment of the benefits due, under the insurance, to the beneficiary named by the insured. Nothing in the decision, in any way, changes or affects the rights or duties of the Federal government and its agents from the very inception of any soldier's insurance program to the performance of the last act, namely the payment of the benefits to the beneficiary.

III

The Validity of the Congressional Act Providing for National Service Life Insurance Is Not Questioned

The decision of Justice Adams merely points out that if courts endeavor to read into the act language which is not there it would deprive wives of soldiers, in community property states, of their vested property interests. Such an extension of the act by judicial decision would be invalid under the Fifth Amendment to the United States Constitution.

It would seem, therefore, that unless this Court desires to enlarge the scope of the Congressional pronouncement, there is no Federal question involved.

IV

Appellants Stand or Fall on Section 454A of Veterans' Relief Act

a. Entire argument for jurisdiction of this Court depends on their interpretation of the above section: No other Fed-

eral statute is involved and we respectfully suggest that if the language of Section 454A, on which they place reliance, is not violated by the decision of Justice Adams, this court does not have jurisdiction.

Analyzing the position of appellants further, with reference to the jurisdiction of this Court, they pin their entire hope and argument to three lines of Section 454A, namely,

> "and benefits shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".

These lines appellants emphasize, but we again suggest to this Court that the three lines emphasized by the appellants cannot be taken out of the Congressional Act and read and interpreted without relation to the remaining provisions of the Act. We think it is necessary to read the preceding language of the section, namely,

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".

It is to be observed, first, that Congress did not say in the Act that vested property rights recognized and established by the laws of any state in the proceeds of such insurance, either before or after receipt by the beneficiary, shall not apply.

Appellants must necessarily take the position, to sustain their point, that the lines which they underscore mean that no court can touch payments made under veterans' insurance either before or after receipt by the beneficiary by

any process of any kind or character whatsoever. If they cannot sustain this position and if this Court is not willing to so hold, appellants are obviously standing on a frail support that cannot possibly bear the weight of establishing the jurisdiction of this Court.

b. Payments of insurance are subject to legal and equitable process: Certainly it is established by the decisions of many courts that legal and equitable process will reach benefits paid under veterans' insurance both before and after they reach the beneficiary where questions of alimony, support of children and like matters are involved.

Gaskins v. *Security Bank*, 30 C. A. (2d) 409 85 Pac. (2d) 681, 685.

> "the beneficent purpose manifested in the act of Congress is to preserve the disabled soldier's fund against imposition on the part of designing people or depletion by the soldier's own improvidence . . ., but we cannot conceive that it was the purpose of the government to prevent the probate courts in guardianship proceedings from authorizing the application of these funds to the needs of the veteran's children . . . The obligation of a father to support his minor children is *not a debt* contemplated by this act of Congress, but is an obligation growing out of the parental status and public policy . . . .".

This court cited *Guardianship of Giambastiani*, 1 Cal. App. (2d) 639 (37 Pac. (2d) 142) where the claim of a guardian of a veteran for moneys advanced for him was approved and the court said:

> "A claim of a de facto guardian for expenditures on behalf of the ward, set up in his subsequent accounting, is *not the claim of a creditor.*"

In *re Flanagan*, 31 Fed. Sup. 402. Here the divorced wife of a lunatic veteran sought the payment of alimony from

funds received by him as disability compensation. The court held that the provisions of 38 U.S.C.A. Sec. 454a did not exempt the veteran from the wife's claim and the court said:

> "The judgment for alimony is not a debt in the ordinary sense. It is an obligation of a higher order . . . the purposes of the exemptions in this (case) were to protect not only the recipient of the benefits but to afford some degree of security to the family and dependents of such recipient. The enactment of these statutes had as their purpose, at least in part, to insure the public against the pauperism of the recipient of the benefits or that of his dependents. A divorced wife is a dependent no less in the status created by the divorce decree than in that fixed by the marriage bond. Congress did not intend to put such benefits beyond the reach of a divorced wife."

This case cites *Schlaefer* v. *Schlaefer*, 112 Fed. Rep. 2d 177, in which later case the opinion was written by Justice Rutledge and construed section 16a of the life insurance act of the District of Columbia which provided that:

> "No money or other benefit paid, provided, allowed, or agreed to be paid by any company on account of the disability from injury or sickness of any insured person shall be liable to execution, attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such insured person . . ."

In writing the opinion Judge Rutledge said:

> "The basic issue boils down to whether Congress intended to relieve the disabled insured to the extent of his disability payments from legally enforceable obligation to support his family and those legally dependent upon him. So far as general creditors are concerned the purpose is clear . . .

> An important, often the primary, motivation for taking out disability insurance is protection of the family, not merely of its supporter. As has been said, the funds are not earmarked for limited and particular purposes. They are derived normally from the insured's earning power . . . By law and the most sacred contract he is obligated to employ it, while it exists, for dependents' support . . . The obligation on which appellant's claim is based is not a "debt" or a "liability" in the ordinary usages of those terms. It is a duty of higher obligation. As has been said, it is not one within the usual purposes of exemption statutes."

Hannah v. *Hannah*, 11 S.E. 2d 779, 781: This case involved a claim for alimony and support by the wife against her husband, then 79 years of age, who was receiving $45.00 per month from the United States government as a result of the death of a son by his first wife in military service. The court noted that these funds were protected by the provisions of 454a and called particular attention to the phrase in said section which reads "and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever". The court then said:

> "We do not, however, view this additional language as extending the exemption beyond the claims of creditors and to thereby cover the claim of the character of alimony."

Stirgus v. *Stirgus*, 160 S. 285 holds that the word "creditors" in section 454, now section 454a, contemplates an ordinary contractual obligation of statutory debt and not a claim arising by operation of law.

In the above cases, and many others that could be cited, the limits of the exemptions set forth in section 454a, or its predecessor 454, were being considered. In each case the conclusion arrived at by the court was that the rights

of a wife to alimony, or of a child to support, or the right of a guardian for reimbursement was not a debtor-creditor relationship and that the provisions of section 454a did not prohibit the enforcement of such rights by state courts.

It appears well established, therefore, that the language of Section 454a does not mean what appellants contend for. The cases mentioned hold that not only are the funds subject to the process of courts of both law and equity in the hands of the beneficiary, but they are likewise subject to such process and may even be sequestered in the hands of the veteran or before they reach his hands.

It is admitted in this case, that the proceeds of the insurance policy in question were community property under the California law.

It is pointed out by Justice Adams in the decision in question that under the provisions of the California Civil Code, section 161a the wife has a vested interest in one-half of community property. (Page 18 of Jurisdictional Statement.) Section 161a of the California Civil Code reads as follows:

> "(Interests in community property.) The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

The community property laws of the eleven states that now enjoy them, have always been recognized by the Federal government—a notable instance being in connection with the separate returns of husband and wife in income tax matters.

If the funds referred to in section 454a are subject to seizure and other process for alimony and in guardianship and child support matters it naturally follows that in the event of a divorce the funds which are community property would be subject to division by the state court between the husband and wife. In other words, the division of a $10,000.00 policy between the husband and wife would be nothing more than turning over to her the property that belonged to her.

It appears to us that the provisions of section 454a are intended to protect the funds in question from creditors and from claims of those hostile to the veteran and his family. The language of the section itself seems to be intended for this purpose and in the section it is to be noted that Congress uses the word "claims" on two occasions. First saying that the funds "shall be exempt from the *claims* of creditors", and again saying "such provisions shall not attach to *claims* of the United States . . .". The processes referred to, namely, attachment, levy, seizure or any process of court are designed to enforce claims of creditors.

A wife in asserting her right to recover her vested property is in no sense a creditor.

Congress amended this act in 1935 as a result of the decision in *Pagel* v. *Pagel*, 291 U. S. 473, 54 Supreme Court 497. This amendment only extended the exemption against claims of creditors to the funds *after they left the hands of the insured and became a part of his estate*, and broadened the language slightly. *At this time the question of the meaning and extent of the exemption under the act certainly was brought clearly and fully to the attention of Congress. We again respectfully suggest that the failure of Congress, at that time, to place in the act any words destroying vested community property rights shows rather clearly that no such intention existed.*

The vested community property rights of women in these soldiers' policies undoubtedly run into millions and millions of dollars and affect hundreds of thousands, if not millions of women. Surely had Congress intended the destruction of these rights it would not have left that destruction to extension of the phraseology of the act by judicial construction.

In this case the appellee continued to work at her profession as a trained nurse long after her marriage to the deceased Leonard O. Wissner, earning the money to permit him to complete his education. (Page 17 of Jurisdictional Statement.) She had not only the legal claim to one-half the insurance because it was her vested property under the laws of California, but she had the moral right to it because her efforts had contributed so largely to the situation of her husband which permitted him to obtain the rank of major in the armed services. He could freely give his half of the community property, as an unexpected gift, to his parents but surely, *the United States government never intended to enter into a secret agreement with a husband by which he could deprive his wife of her property. Surely Congress never intended any such result.*

As we previously pointed out, unless this intent is in the act of Congress, the appellants' one argument for the jurisdiction of this Court falls.

V

Supreme Court of the United States Limits Provisions of Section 454a

We are not without authority from this Court for limitation on the exemptions set forth in section 454a. This matter was before Your Honors in the case of *United States Trust Co. of New York* v. *Helvering*, 307 U. S. 57,

83 L. Ed. 1104. The question before the court at that time was whether or not the proceeds of a veteran's insurance policy, in the sum of $10,000.00 paid to the widow, should be included in the estate for the purpose of determining the federal estate tax.

The claim was made that since the World War Veterans' Act of 1924 contained the provision that insurance payments thereunder "shall be exempt from all taxation", and the amendment thereto in 1935 did not significantly change the situation, the proceeds of the insurance policy should not be included in the estate for federal taxation purposes. Mr. Justice Black, in writing the opinion, said:

> "Exemptions from taxation do not rest upon implication . . . in an analogous situation federal bonds exempted by statute from all taxation have been held subject to a federal inheritance tax."

The opinion held that the proceeds of the insurance policy must be included in the estate of the veteran for the purpose of collecting federal taxes. It is true that Mr. Justice Black made the distinction that the tax was on the transfer rather than on the property, and with this position certainly no one could quarrel.

What we desire to point out and emphasize is this: The language of the statute which Your Honors construed in the last cited case was, to all intents and purposes, absolutely clear, specific and plain. Congress said that the funds should be exempt from *all* taxation. Your Honors felt, however, that in spite of that language it was not intended to exempt the funds from the tax that would be paid on them as a result of their inclusion in the estate for determining the federal estate tax.

We contend that it logically follows that the phraseology used in section 454a should be regarded as clearly applying only to the matters therein specifically referred to, namely,

claims and particularly *claims of creditors.* Just as in the decision of this Court last referred to it was held that even where Congress used the phrase "exempt from all taxation" it could not be held to cover the inclusion of the proceeds of a government life insurance policy in an estate for federal estate tax purposes, so we suggest that in the present case the phraseology used by Congress, which is not nearly as specific, cannot be said to cover the destruction of vested property rights.

VI

State Community Property Laws Have Been and Are Recognized As Applicable

Preliminary to citing a few authorities on this point, we call attention to the fact that appellants filed, as Appendix B to their statement of jurisdiction, the memorandum ruling of Judge Clarence Hanson of the Superior Court of Los Angeles in the case of *Johnson* vs. *Shelton*, filed on February 28, 1949. While we doubt that decisions of the Superior Court are particularly helpful in this matter, we call attention to the fact that up to that date, namely February 28, 1949, there had been four decisions in the Superior Courts of California on this particular matter. Namely, *Cora Belle Bennett* v. *Modesta Lee Bennett* decided in the appellate division of the Los Angeles Superior Court by Judge Myron Westover on March 20, 1946, holding that the wife was entitled to recover her community half of the insurance from the beneficiary; *Wissner* v. *Wissner*, the instant case, which was decided by Superior Court Judge B. C. Hawkins of Stanislaus County, in which he took the same position as that of Judge Westover; *Carballo v. McFann*, decided by Judge Otto J. Emme in the Los Angeles Superior Court on November 5, 1949, who likewise held the wife entitled to recover her community half of the payments under the policy from the beneficiary.

The decision of *Johnson* v. *Shelton*, set forth as Appendix B of appellants' statement on jurisdiction was fourth of the decisions in this state and in that decision Judge Hanson not only overruled the higher courts of California, but, without mentioning any of them, overruled the two prior decisions of judges in his own Superior Court in Los Angeles.

In *United States* v. *Robinson*, 40 Fed. 2d 14, it was held that the state law of Louisiana should apply in determining the rights as between a legal and a putativo wife.

Succession of Lynch vs. *United States*, 17 Fed. Supp. 674, cites *United States* v. *Robinson* and takes the same position. It is likewise worthy of note that in this case, at page 676, it is recognized that the proceeds of the policy are community property where the premiums are paid by community funds. We quote the following from the decision:

> "In default of a named beneficiary, proceeds of this policy fell into the community, *since it was taken out and the premiums were paid during the existence of the good faith relation which ended only at the death of Silas Lynch* (the soldier). *The policy was thereby matured and Emma Lynch became the owner of one-half of this community estate.* . . ."

United States v. *Primilton*, 76 Fed 2d 555. Here again the case of the *United States* v. *Robinson*, *supra*, is cited with approval and the opinion shows that the United States in prosecuting its appeal from the District Court of the United States for the Western District, took the position that the character of the proceeds of the insurance was to be determined by Louisiana law and that it was the property of the community.

Other cases supporting the contention that the character of the funds is to be determined by state law are:

United States v. *Rose*, Tex. 57 S. W. 2d 350 where it was held that premiums were paid from community earnings and

awarded one-half the insurance to the widow. Appellee United States was a party to that action and *United States* v. *Robinson, supra,* was cited with approval.

Succession of Jones, La. 169 S. 440 cited *United States* v. *Robinson* with approval and held that premiums were paid during wedlock out of soldier's pay; that the soldier and his wife were residents of a community property state and the insurance became a community estate and the wife was entitled to one-half as the surviving spouse in the community.

The appellants in this case place some reliance on *James* v. *United States* (S. D. Cal. 147 unreported), and attach a copy of the findings of Judge Harrison in said matter marked as Appendix "C". As we view this case any remarks made by Judge Harrison contrary to the decision in *Wissner* v. *Wissner* are purely dictum and the decision itself has no bearing on the situation that now confronts your Honors.

Under Texas law the wife has no vested interest in life insurance purchased with community funds as she definitely has under California law. The wife's interest in Texas is but an expectancy as she must show not only that the premiums were paid by the husband with community property and another person named as beneficiary, but she must also show the express intent of the husband to defraud her.

Lawrence v. *Shaw,* 300 U. S. 245 (57 Supreme Court 443) relied upon by appellants and also cited in *Barton v. U. S.* and *Johnson* v. *Shelton* related only to the question of exemption from taxation. Chief Justice Hughes held that the exemption continued after the money was deposited in the bank so long as it could be identified and so long as it had not been reinvested. We fail to see that this case applies to any of the present issues.

Other cases relied on by appellants to show the jurisdiction of this court we comment on very briefly as follows:

Lewis v. *U. S.* 56 Fed. (2d) 563. *Court applied local law* which provided that a change of beneficiary executed on a Sunday was voidable but held that the insured had affirmed such act and hence the change was valid between contestant claimants. It is interesting that both sides relied on *local* law in this case.

U. S. v. *Sterling*, 12 Fed. (2d) 921. In this case the United States was a party. The court held that no agreement could defeat the insured's right to change beneficiary (which we agree with) and further that the beneficiary was properly changed by the insured. In that case, the point before the court was specifically covered by the contract and the federal statute, and the United States was a party to the action.

Counsel for appellants have cited approximately fifty cases without discussing any of them. These cases were cited by counsel in the California courts and we analyzed them and are convinced that they are lacking in discussion of the one principal point involved in this matter. Hence, we refrain from further detailed consideration of them. We are, however, attaching to this statement as Exhibit "A" printed copy of our Memorandum of Oral Argument Filed by Permission of the District Court of Appeal of California, Third Appellate District, in which we discuss the decision of Judge Mathes in *Barton* v. *U. S.*, 75 Fed. Supp. 703 and present our analysis of the cases relied on by him.

We would not burden this statement with this analysis except that the case of *Barton* v. *U. S.* is the only reported federal case in which an opinion referring to some of the points involved here is found. We believe Judge Mathes' reference to the community property situation was largely

dictum but appellants obviously rely on it to a considerable extent.

VII

Summary of Matters and Grounds Making Against Jurisdiction of This Court

In concluding this statement we briefly point out our contentions as follows:

1. This is not a suit in which the United States is involved as a party.

2. The validity of the Congressional Act is not questioned and the holding in the case does not conflict with it in any way.

3. Appellants' only contention is that this Court has jurisdiction because Section 454a contains the language:

> "benefits shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever"

and as shown by this statement the courts have established that this language does not mean what appellants contend and that the proceeds are subject to court process and to seizure and to sequestration for the protection of certain rights.

4. The language of Section 454a was intended to apply to *claims* and to creditors.

5. The proceeds of the policy in question here are without question community property of the appellee and her deceased husband under the laws of California and are admitted to be such by the pleadings.

6. There is nothing in the language of 454a that seeks to take away the vested admitted community property

right of the wife and every indication is that it was never intended that the statute go that far.

7. No court would uphold a secret agreement between a private individual and the husband depriving the wife of her interest in the proceeds of insurance.

We do not believe the United States Government intended to enter into such a secret agreement and certainly no such agreement is necessary to the operation of the Veterans' Insurance Program.

8. This Court has already held that the act will not be construed to destroy the well recognized right of the United States government to include the proceeds of the policy in an estate for taxing purposes.

9. The logical conclusion from this holding is that the act will not be construed to destroy the well recognized vested property rights of women in California and other community property states.

10. Courts have recognized that the funds are subject to seizure, process, and sequestration for alimony, support, and in guardianship matters. The interest of the wife provided in community property states is only an indirect method of providing ahead of time for her support and care. Certainly it was not the intention of Congress to destroy this right.

We have attached to this statement a motion to affirm the judgment of the Appellate and Supreme Courts of California and to dismiss appellants' appeal to this Court.

We respectfully and most earnestly submit that this court should leave controversies of this character between individuals only and not involving the United States or any representative thereof wholly in the hands of the state courts

and that jurisdiction of the Supreme Court of the United States in this case is not indicated.

Respectfully submitted,

LESLIE A. CLEARY, of
CLEARY and ZEFF,
Attorneys for Appellee.

Receipt of a copy of the above Statement is acknowledged this 31st day of May, 1949.

CARLOS J. BADGER and
VERNON F. GANT,
By CARLOS J. BADGER,
Attorneys for Appellants.

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Civil No. 7528

MARGARET V. WISSNER, Plaintiff and Respondent,

vs.

LOUISE M. WISSNER and LEANDOUS H. WISSNER, Defendants and Appellants.

MEMORANDUM OF RESPONDENT'S ORAL ARGUMENT FILED BY PERMISSION OF COURT

CLEARY AND ZEFF,
County Offices Building, Modesto, California,
Attorneys for Respondent.

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MEMORANDUM OF RESPONDENT'S ORAL ARGUMENT FILED BY PERMISSION OF COURT

This memorandum is filed by permission of your Honors after the presentation of oral argument and will be directed largely toward an analysis of the case of *Barton v. United States*, 75 Federal Supplement, 703, and a summary of the cases therein cited.

It will be our purpose to set forth the summary of the cases cited in this Federal District Court decision as briefly as possible, but with the full intention of giving a fair representation of the real point at issue and the decision thereon in each case.

Analysis of the Decision in Barton v. United States, Supra

1. The Facts.

The deceased soldier Barton had a National Service Life Insurance Policy issued pursuant to the Act of 1940, as amended by 38 U.S.C.A., paragraphs 801 to 818.

At the time the policy was issued shortly after July 3, 1943, the deceased Barton was not married. He named his mother as first beneficiary under the policy and his brother as contingent beneficiary. On September 20, 1944, the deceased Barton married Shirley Jean O'Leary Barton at Oakland, California, and they remained husband and wife, residents of California at all times after their marriage and up to the date of his death, which occurred on April 2, 1945. The deceased made no effort to change the beneficiary prior to his death.

The plaintiff, surviving widow of the deceased, filed a claim with the Administrator of Veterans' Affairs for her community one-half interest of the portion of the proceeds resulting from the payment of premiums from community funds. It was agreed that approximately 30% of all premiums paid were paid from the service pay of the deceased after the marriage, and that such pay was community property under California law. The Administrator denied plaintiff's claim and awarded all of the proceeds to the insured's mother as the named beneficiary.

Judge Mathes who wrote the decision in question states that "Resulting 'disagreement as to any claim' gave rise to this suit," citing 38 U.S.C.A., 817 and 445c.

At the time of the oral argument I read to your Honors a portion of Section 445 as follows:

> "The term 'claim' as used in this section means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veterans Affairs or someone acting in his name on an appeal of the Administrator."

Section 445c provides:

> "A denial of a claim for insurance by the Administrator of Veterans' Affairs or any employee or agency of the Veterans Administration heretofore or hereafter designated therefor by the Administrator shall constitute a disagreement for the purpose of Section 445 of this title."

Throughout this discussion of *Barton v. United States*, we will at appropriate points interpolate our comments concerning the conclusions of the Federal Court and the authorities cited in support thereof.

In line with this thought I call attention now to the fact that this section seems to definitely indicate the intent of Congress to provide only for the litigation of disagreements involving the question of the payment of the funds by the United States to the person entitled thereto under the contract of the soldier. It does not purport to cover the litigation of the rights of the California wife, under our community property laws, in and to funds that have left the hands of the United States government and are in the possession of another resident or citizen of the State of California.

We now direct your attention to the fact that Judge Mathes by his own statement with reference to the resulting "disagreement," which I quoted above, was centering his attention on the disagreement as to whom *the United States should pay the proceeds of the insurance*. If, as we contend, this problem is separate and distinct from the question as to the rights of California wives against those who have received community funds from the government, Judge Mathes' decision went far beyond the "disagreement" that he was required to settle.

2. The Law

From this point on we will consider the law referred to by Judge Mathes in the opinion in question quoting his statements and discussing the cases cited by him in support thereof.

(a) "The insurance contract, as set forth in the act, is solely between the Government and the insured. 'The

only relations of contract were between the Government and him' * * * Plaintiff admittedly is not a beneficiary within the language of that contract * * *"

Judge Mathes cites three cases in support of this statement, but we do not believe that it is necessary to extend this discussion by repeating the citations or considering the cases as we concede that these points made by Judge Mathes are correct. The opinion continues:

"So any right of plaintiff to share in the proceeds must rest solely upon the claimed supervention here of California's community property law. (Cf. Cassarello v. United States, D. C., 271 Fed. 486, 488, affirmed, 3 Cir. 1922, 279 Fed. 396)."

The facts of the last cited case were very briefly as follows: The deceased soldier had obtained a veterans' insurance policy through the Bureau of War Risk Insurance. He failed to name a beneficiary in the *policy*. In the *application* he named Patsy Gillette. The decision in the District Court gave to the plaintiff, the executor of the Estate of Patsy Gillette, all the installments falling due up to the death of Patsy Gillette, and admitted in evidence for the purpose of fixing the beneficiary the application signed by the deceased soldier. On appeal to the Circuit Court, 279 Fed. 396, the Circuit Court mentioned three disputed points that were involved. Among them

"The admission in evidence of Lawrence Siegle's (deceased soldier) application for insurance"

stating

"as the question raised by this last assignment underlies and is decisive of the whole case, we first turn to it."

The Court said that the claim for the exclusion of this application was based on a Pennsylvania statute and that that statute specifically governed companies organized under the laws of Pennsylvania or foreign companies doing business therein. Further, said the Court:

"Manifestly that statute has no application to the present certificate for the United States which issued it

> was not an insurance company, and its certificate was not one issued by 'companies organized under the laws of this state or by foreign companies doing business therein.' The statute simply does not apply * * *"

It was further pointed out in the original decision in this case, 271 Fed. 486, at 489 and 490, that the contract of insurance itself made the *application* a part thereof.

It is apparent, therefore, that in this particular case the decision was actually based on the fact that there was no conflict between the state law and the United States statutes in question because the application was included in the contract by agreement and because the Pennsylvania law by its wording did not cover policies issued by the United States.

Continuing, Judge Mathes said:

> "If state law controls, plaintiff's claim is sound to the extent of one-half of that portion of the proceeds paid for with community funds."
>
> *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351.

This statement is unquestionably the law, and a discussion of the case cited as authority therefore becomes unnecessary.

> (b) "Whether state law can control disposition of proceeds of policies issued pursuant to the National Insurance Act of 1940, 38 U. S. C. A. Section 801 to 818, depends upon the intent of Congress; for it is clear that the act, being a constitutional exercise of powers granted to Congress (U. S. Const. Art. I, Sec. 8, Cls. 1, 13), is 'Supreme Law of the Land'," (citing three cases which we will hereafter discuss.)

In our oral argument we directed your Honors' attention to the fact that we believe Judge Mathes' premise in this statement is entirely wrong; namely, that the determination of the question depends upon the *intent of Congress*. We take the position that in order to sustain Judge Mathes' decision it must appear first, that Congress intended to destroy the community property rights of California women, and second, that such destruction was "necessary and proper" for carrying into execution the

insurance program. This contention is based on the fact that the power of Congress to create federal insurance for soldiers can only be exercised within the limits of Article I, Section 8, cls. 18 of the United States constitution and that, therefore, the Act of Congress must be subjected to this test; namely, is it necessary and proper to destroy the recognized community property rights of women in any state in order to carry out the soldiers insurance program? We, of course, agree that a Congressional Act is the supreme law of the land providing it is constitutional. We do say, however that no Congressional act is the supreme law of the land insofar as it attempts to go beyond the limitations of the Constitution of the United States, and we feel that Judge Mathes failed to consider whether or not, if Congress intended to destroy community property rights by the act, it was necessary and proper for it to go that far.

The cases cited by Judge Mathes under this section of his opinion are as follows: *Mayo v. United States*, 319 U. S. 441, 87 L. Ed. 1504. The problem involved in this case is as follows: The Federal government through the Agricultural Adjustment Administration was engaged in the business of furnishing fertilizer to Florida farmers under the Soil Building and Conservation Program. There was on the statute books of Florida an act providing for the inspection of fertilizer and the payment by the distributor of a reasonable inspection fee to the state. A specially constituted Federal District Court enjoined the Commissioner of Agriculture of the State of Florida from enforcing the provisions of the state act against the United States. Mr. Justice Reed in deciding the case said, in substance, that these inspection fees were charged directly upon the United States, and if nforceable, would be required before executing a function of government. These fees, he stated, "are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials." He concluded that the United States freedom from state fees or taxes where the federal government is carrying on a proper function is "inherent in sovereignty," and therefore sustained the injunction.

In deciding the case he stated that it was to be distinguished from three other types of cases; namely, (1) a state

statute which fixes a tax on the salary of an employee of the United States; (2) a state statute fixing a tax on purchases made by a supplier of the United States Government; and (3) a state statute fixing price control of a contractor with the United States. (319 U. S., pages 447-448.)

Prigg v. Pennsylvania, 41 U. S. 539, 10 L. Ed. 1060. This case was decided in 1842. The discussion and numerous opinions cover 82 pages of very fine print, but summarizing the situation as briefly as possible, it appears to us to be as follows: A slave girl named Margaret Morgan escaped from her owner, Margaret Ashmore, in the State of Maryland, fleeing to the State of Pennsylvania for some time, long enough, in fact to give birth to a second child. Margaret Ashmore, the owner, appointed Edward Prigg her agent and attorney to return the slave to her possession in Maryland. Prigg proceeded to Pennsylvania, had a state constable under a warrant from Pennsylvania apprehend the negro woman and take her before a magistrate, who refused to take further cognizance of the case. Prigg thereupon removed the negro woman and her children from Pennsylvania back to Maryland. Prigg was indicted in the Lower Court of York County, Pennsylvania, under a statute of Pennsylvania passed in 1826 which in substance provided that any person taking or carrying away any negro or mulatto from the Commonwealth of Pennsylvania with the intent of keeping or detaining such negro or mulatto in slavery shall be subject to fine and imprisonment. Prigg plead "not guilty," and on trial by jury a special verdict was found which in substance set forth the facts above outlined, including the fact that Margaret Morgan was actually the slave of Margaret Ashmore. The Court upon this special verdict adjudged Prigg guilty of the offense charged in the indictment. A writ of error was brought to the Pennsylvania Supreme Court where the judgment was affirmed pro forma, whereupon a writ of error was brought to the Supreme Court of the United States and the decision in question is upon that writ of error.

Mr. Justice Story wrote the opinion in the case, page 606. He pointed out the fact that the constitution of the United States specifically covered the point in question in Article IV, Section 2, Cls. 3, "No person held to service

or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." He stated further that Congress acting under the authority of this provision of the Constitution had passed the Act of February, 1793, Chapter 51, which provided, among other things, that the owner of a slave could seize the slave in another state, take him before a magistrate and the magistrate, upon proof of ownership, should issue a certificate for the slave's return to the owner's state and that a section of this act provided a penalty on anyone who knowingly or willingly obstructed or hindered the claimant, his agent or attorney in seizing or arresting such fugitive slave.

In the light of the constitutional provision and the legislative act and without going into detail as to the very interesting discussion of all of the various highways and byways leading to and from the point in question, we merely say that Judge Story came to the conclusion that the Pennsylvania act was unconstitutional because it purported to punish the act of seizing and removing a slave by his master, which act the constitution of the United States was clearly designed to justify and uphold.

In our oral argument we commented on this case to the effect that it seemed to be of little help in determining the present controversy because it was based on such clear facts and contained only decisions of points that are conceded to be correct by everyone.

Pierrard v. Hock, 184 Pacific 494 and 191 Pacific 328.

In this case a suit was brought in Oregon for the purpose of foreclosing a mortgage against a soldier. The Lower Court entered a decree of foreclosure. There was an appeal to the Supreme Court of Oregon where the decree of the Lower Court was reversed, and upon petition for rehearing in the Supreme Court of Oregon that Court reversed its former position and affirmed the decree of the Lower Court. The question presented on the rehearing was whether or not Congress by passing the Soldiers and Sailors Civil Relief Act on March 8, 1918, specifically referred to on page 328

of 191 Pacific, had occupied the whole field or whether a law of Oregon further restricting foreclosures could be applied.

On the rehearing the Supreme Court of Oregon, after considering the language of the Soldiers' and Sailors' Relief Act held that it did occupy the whole field and that the language of that act was incompatible with the language of the Oregon statute in question. Hence the federal act must be determinative of the matter.

In our oral argument we called attention to a quotation appearing in this opinion at page 330 of 191 Pacific where the Court quotes an opinion of Mr. Justice Hughes in the case of *Savage v. Jones*, 225 U. S. 501, as follows:

> "When the question is whether a federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. • • •
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

It was and still is our position that this quotation from Justice Hughes' decision supports our position that the act under consideration by the Court at this time does not cut off the community property rights of California women.

The entire purpose of Federal insurance for soldiers can be carried out without the necessity of avoiding the community property laws of this state and no inconvenience will result to the Federal government. The Act of Con-

gress, carefully read and fairly interpreted, is not in actual conflict with the community property laws of the State of California which would normally entitle the wife to recover her community one-half of the proceeds of the insurance policy from the beneficiary.

Judge Mathes continues:

> "The act provides: 'The insurance shall be payable only to a widow, widower, child, parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: Provided, That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life-insurance policy maturing on or after August 1, 1946.' (38 U. S. C. A. p. 802(g))"

(After the end of the war the government recognized the soldiers' right to name any beneficiary regardless of relationship and subject, we presume, only to the general rule that the beneficiary have an insurable interest.)

> "The policy at bar matured prior to August 1, 1946, hence was subject to the 'restricted permitted class of beneficiaries.' Section 802(h) contains comprehensive provisions as to the manner in which the proceeds shall be paid in installments to beneficiaries designated by the insured, if living; and as to whom shall be paid 'any installment certain of insurance remaining unpaid at the death of any beneficiary.'"

> "Section 802 (i) provides as to policies maturing prior to August 1, 1946, that 'The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any • • • such insurance • • •.' While Section 802(j) declares that 'No installments of such insur-

> ance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary . . .' (See also 38 U.S.C.A. Sections 802(x) and 808.)"

Judge Mathes then makes what seems to us to be a wholly illogical and irrelevant statement as follows:

> "The cited provisions are persuasive that it was the purpose of Congress to provide in all details for the issuance and administration and settlement of service life insurance on a national basis, as the title of the Act implies."

There is no reason why we should not assume that Congress not only intended to provide, but did provide, all details for the *issuance* and *administration* and *settlement* of service life insurance on a national basis. Assuming that Judge Mathes' statement is correct and unquestioned, the statement does not in any way foreclose the right of a California wife to claim from the beneficiary her proper community share of the proceeds after the beneficiary has them.

The cases cited by Judge Mathes in support of his statement may well be unimportant if the Court agrees with us in our position that the statement itself does not hit at the meat of the problem with which we are faced, but for the purpose of being as helpful as we may be, we give the following summary:

> *James Stewart & Co. v. Sandrakula*, 60 Super. Ct. 431, 84 L. Ed. 596.

The question involved in this case was whether or not a New York Labor Law requiring a builder to board over all steel tiers for the protection of employees was effective where the contractor was employed in building a building for the United States upon land owned by the United States under a contract between himself and the United States, having in mind the fact that the contract provided in substance that state and municipal building restrictions do not apply to the land inside government lot lines. The Supreme Court decided that while all of the provisions of the

labor law of New York in question could not be enforced within the boundaries of property owned by the United States, this particular requirement of the law would not in any way interfere with the sovereignty of the United States or the construction of the building. The Court said it might slightly increase the cost, but since there was no Act of Congress directly in conflict with the provision of the New York labor law in question, it was proper that it should be enforced. The Supreme Court said further that the clause in the contract reading "state or municipal building regulations do not apply to work inside the government lot lines," was not properly admissible in evidence because the contractor did not share in any governmental immunity, and furthermore, they were of the opinion that this clause applied to types of material, fire hazards, and similar situations covered by the New York City Building Code.

New York Central R. R. Co. v. Winfield, 244 U. S. 147, 61 L. Ed. 1045.

The facts in this case are as follows: An employee of a railroad company engaged in interstate commerce was injured without any negligence on the part of the railroad. He sought compensation for the injury under the Workmen's Compensation Law of New York and compensation was granted. The insurer brought this writ of error in the Supreme Court of the United States.

Mr. Justice Van Devanter delivered the opinion of the Court holding that the federal employers' liability act passed by Congress for the purpose of covering injuries sustained by railroad employees engaged in interstate commerce occupied the entire field, and that the state act was therefore ineffective.

Judge Brandeis dissented, saying among other things:

> "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserve power of the state is not to be regarded as inconsistent with an Act of Congress passed in the execution of a clear power under the constitution unless the repugnance or conflict is so direct and positive that the two acts cannot be recon-

ciled or stand together. (*Missouri K. & T. R.R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878)."

In order that this decision might be a direct authority on the problem that now confronts this Court, the act of Congress providing for the compensation of injured employees in interstate commerce would have had to go so far as to control the rights of the husband and wife in that compensation after it was received by the injured employee. Suppose, in other words, Congress attempted to say that funds recovered by a husband as a result of an industrial injury incurred while engaged in interstate commerce are entirely free from any community property rights of the wife as fixed by state law, does it seem likely that such an extension of the provisions of that act would be held "necessary and proper" in executing its power to regulate interstate commerce as against community property laws enacted under the reserve powers of the states?

United States v. Fuller, 97 Fed. (2d) 541.

The facts in this case were as follows: In this case it was admitted that the federal statutes governing veterans' insurance provided that payment of monthly installments should be made to the personal representatives of the person entitled after the latter's death when the combined amounts are more than $1,000.00.

The claimants were not the personal representatives but were the heirs of the person entitled. They had filed no claim with the administrator, but their position was that under the state laws of Louisiana the "intestate succession" vests in the legal heirs by operation of law at the instant of the death of the deceased and that no administration is necessary.

The Court held that since the federal statute specifically provided that payment must be made to the personal representative, the state law could not be applied as it was in direct conflict therewith.

We call particular attention to a portion of the language used in this decision found on page 542:

"Such claims have their basis and foundation in the Federal statutes, which, creating the claims and the

> conditions under which they may be maintained, completely govern and control *their presentation as claims*, and suits brought upon them, *against the United States.*"

This language fits so closely the position we take that it naturally seems of considerable interest from our point of view. In other words, this Court says that the Federal statute controls the presentation of claims to the United States and suits upon claims against the United States. There is no indication that the Court believes that the statute goes any further than this, or needs to go any further than this, in carrying out the veterans' insurance program.

Judge Mathes continues his decision with this statement:

> "This view finds added support in Section 816 (See 38 U.S.C.A. Sec. 454a), which directs that 'Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary'."

It is to be noted that the Section of the United States Code Annotated above quoted by Judge Mathes applies only to *attachment, levy* or *seizure* of the funds in question. Certainly this section of the act does not mean that the funds are entirely exempt from legal or equitable process. Let us suppose that the funds come into the hands of the veteran himself by payment of the policy when it matures. He has two minor children who are entitled to his support. He is a confirmed drunkard, and in a proceeding before a Superior Court of this state to require him to support his children it appears that these funds received from a veterans' insurance policy are rapidly being squandered and dissipated by him in drinking and gambling. Is there any question but that the state court could require the use of those funds for the support of the children and by its process hold such amount as might be reasonable for that

purpose. Such action by the Court would in no wise conflict with the Veterans' Insurance Act and certainly would not be prohibited by the section of the United States Code Annotated cited by Judge Mathes.

Suppose, on the other hand, the policy in question has been converted to an endowment policy, and the veteran and his wife have paid the premiums from community funds for many years. Under the contract with the government the veteran alone is entitled to receive the proceeds of the policy when it comes due. The proceeds are paid into his hands. He and his wife become involved in a divorce action in which she requests the Court to protect her community interests in these funds which are in the bank. It seems hardly likely that the courts of this state would not have the right to use their process for her protection, and certainly nothing in the Congressional Act involved in this appeal would conflict with such a use of the California courts' powers. If we are correct in this position, then it must naturally follow that the California courts may use their powers to protect the wife's interest in the funds by awarding judgment against the beneficiary who has received those funds and is subject to the jurisdiction of the courts of this state.

In short, the question of attachment, levy or seizure is not a question involved in this particular appeal, and it is obvious that that language was used for the purpose of protecting the funds from seizure by creditors up to a certain point.

(c) Judge Mathes states that:

> "Federal control of title to the proceeds of service insurance, both before and after payment by the Government, has been consistently recognized and enforced."

This statement is true to a very limited extent, and it is equally true that Judge Mathes does not cite and cannot cite any instances where the government has intervened against a wife in California attempting to assert her community property rights as against a person who admittedly has received community property without consideration.

The cases cited by Judge Mathes on this point are as follows:

Lawrence v. Shaw, 300 U. S. 245, 81 L. Ed. 623.

This case involved the following situation. The World War Veterans Act of June 7, 1924, provided that the compensation and insurance allowances should be exempt from all taxation. The petitioner in this case was the guardian of a veteran who had received compensation from the United States Government and deposited it in his bank account as guardian of the veteran. The assessor tax collector assessed the funds for taxation, and on an agreed statement of facts the question presented was whether or not the exemption provided by the act was applicable to the funds after they reached the hands of the veterans. Chief Justice Hughes held that the exemption did apply as long as the funds were merely kept in the bank account and were not reinvested, but that the exemption disappeared upon reinvestment. He stated that it was not the intent of the Congressional Act that in order to claim the exemption the veteran or his guardian had to keep the funds in his pocket, and that merely by depositing it in the bank the exemption was not lost. Chief Justice Hughes called attention to the fact that in the stipulation as to facts it was agreed that the funds were "uninvested balances."

Lewis v. United States, 56 Federal (2d) 563.

This case involved a soldier's policy of insurance obtained by application for reinstatement and conversion. The policy was issued with his aunt as beneficiary and delivered to him July 1, 1927. On August 19, 1928, the insured by a letter directed the Veterans' Bureau to change the beneficiary to his wife, Virginia T. Mossett. The change was made a few days later. The insured died December 5, 1928. Mary C. Lewis, the first named beneficiary, made claim for the proceeds. The Veterans Administration refused to pay her and she brought suit against the United States and Virginia T. Mossett. Virginia T. Mossett, of course, claimed as the named beneficiary. Mary Lewis claimed that the attempted change of beneficiary was invalid for several reasons: (1) because the insured was so intoxicated at

the time that he did not know what he was doing; (2) because the letter directing the change was written on Sunday and was invalid under the laws of Pennsylvania; and (3) because she had an agreement with the insured for which said paid him a consideration and by which he was not to change the beneficiary.

The District Court granted a nonsuit and also denied a new trial. The Circuit Court held that the issue of intoxication should have been submitted to the jury; that the matter of the letter being written on Sunday presented the question of a voidable contract that may have been affirmed by later acts and that this also should have been submitted to the jury; that the agreement not to change beneficiary was not enforceable; that since the policy in question was converted insurance, there was no limitation on the naming of a beneficiary, and the question of whether or not Virginia Mossett was the wife of the insured was not important; and that whether or not she had an interest was not important because the letter amounted to an assignment and that an assignment would have been perfectly proper. The Upper Court reversed the judgment of nonsuit and remanded the case for further proceedings in accordance with its opinion.

We are unable to see that this decision has any relevancy at all in connection with the assertion of Judge Mathes quoted at the beginning of this subsection (c) of our memorandum.

Culp v. Webster, 25 Cal. App. Supp. (2d) 759, 70 Pac. (2d) 273.

The undisputed facts in this case were that the defendant was a veteran of the First World War; that he had cashed in his adjusted service certificate and held the proceeds separate and distinct from other funds at all times. The plaintiff obtained a judgment against the defendant for $300.00. On supplementary proceeding the defendant was ordered to deposit the sum of $300.00 with the Marshal. The defendant did so and then made a claim of exemption on the basis that the deposit was made from moneys received on his adjusted compensation certificate.

The Court examined the federal statutes applying to the provisions of the adjusted compensation certificates issued in the First World War and determined that the provision applying at that time is now included in Section 454a, Chapter 10, Title 38 U. S. C. A. This statute specifically provides that payments due or to become due under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure.

The Court held that the funds were exempt from claims of creditors and, therefore, exempt from seizure to pay such claims. Hence, it affirmed the order granting defendant's motion for exemption of property from execution.

Judge Mathes continues as follows:

> "Congressional purpose to secure nation-wide uniformity is further manifested in Section 817, which confers jurisdiction upon the federal courts 'to hear and determine all * * * controversies' which may become the subject of suit 'in the event of disagreement as to claims' under any policy issued pursuant to the Act (38 U. S. C. A. Section 445, 551.)"

As we pointed out in our oral argument, and have briefly mentioned in this memorandum, Section 445 of 38 U. S. C. A. and Section 551 thereof do not seem to us to give any comfort or help to Judge Mathes.

Section 445 says "In the event of disagreement as to claim * * * under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder, an action on the claim may be brought against the United States * * * All persons having or claiming to have an interest in such insurance may be made parties to such suit * * *." The section further provides for an interpleader by the United States where there is a dispute as to the persons entitled, but this section concludes with the definition which we quoted above:

> "The term 'claim' as used in this section means any writing which alleges permanent and total disability at a time when the contract of insurance was in force or which uses words showing an intention to claim

> insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veteran Affairs * * *."

Section 551 does not add anything to Section 445 insofar as our present controversy is concerned. If the definition is read in conjunction with the first statement of Section 445, namely, "In the event of disagreement as to claim," it appears to us that it is quite obvious that neither the disagreement contemplated by the section or the claim contemplated by the section is involved in the present controversy.

Quoting again from Judge Mathes' opinion, we find this statement:

> "It is settled that 'the authority of state laws or their administration may not interfere with the carrying out of a national purpose.' (James Stewart & Co. v. Sandrakula, supra, 309 U. S. at page 103, 60 S. Ct. at page 436)."

This statement of Judge Mathes appears to be correct with certain qualifications, namely, first: the national purpose involved must be delegated to the national government by the Federal constitution, and second: the Congressional Act in question can go so far and only so far as its provisions are *necessary and proper* to execution of the primary purpose delegated to the Federal government by the United States Constitution.

Judge Mathes continues with the following statement:

> "Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to void a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle."

Judge Mathes cites *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. Ed. 1915, in support of this statement.

This case involved the question of whether or not a state law of Arizona limiting the length of passenger trains to fourteen cars and freight trains to seventy cars was invalidated by the commerce clause of the United States Constitution and the Acts of Congress in pursuance thereof. Mr. Justice Stone delivered the opinion and held that the state act was in conflict with the Federal Constitution and the Congressional Acts. He pointed out that at that particular time when we were in war, the Arizona act was more restrictive than any other state, except Oklahoma, and that it resulted in the necessity of breaking up trains in order to get them through the State of Arizona, thus definitely hampering the handling of interstate commerce. Justices Black and Douglas dissented.

We have already summarized the other two cases cited by Judge Mathes in this portion of the opinion, namely, *James Stewart & Co. v. Sandrakula*, supra, and *Mayo v. United States*, supra. His citation of *Southern Pacific Co. v. Arizona*, supra, does not seem to be a particularly happy choice insofar as the problems in our case are concerned, but within constitutional limits the dominancy of federal acts is unquestioned.

Continuing further Judge Mathes states:

> "Had Congress intended to permit state law to control as to any beneficial interest under service insurance policies, precedent gives assurance that language appropriate to such a purpose would have been employed."

In support of this conclusion the case of *Helmholz v. Horst*, 294 Fed. 417 at 419, was cited.

We have read this case with some care and do not find any statement in the opinion giving assurance that had Congress intended to permit state law to control any beneficial interest, language appropriate to such a purpose would have been employed.

The contest in this case was between a brother and some half-sisters of the deceased soldier and an aunt who had stood in the relation of *loco parentis* toward the decedent. He left a document which was questionable as a will, but

the Lower Court found that there was no question that the deceased intended by the document to name his aunt as beneficiary.

At the time the policy was issued an aunt was not within the permitted class of beneficiaries, but later Congress adopted an amendment including "persons who have stood in loco parentis to a member of the miltary or naval forces at any time prior to his enlistment or induction for a period of not less than one year." The War Risk Insurance Act provided that the terms and provisions of the insurance contracts issued under it should be subject in all respects to the provision of the act and any amendments thereto. The latter amendment extending the permitted class of beneficiaries above referred to specifically provided that it should be deemed to be in effect as of October 6, 1917, a date prior to the issuance of the policy in question.

The Court held that the District Court was correct in determining that the deceased had named his aunt as beneficiary and that the amendment was a part of the contract and, therefore, she was entitled to receive the proceeds of the insurance from the United States.

(d) Judge Mathes makes the final statement:

> "I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A. Sections 801-818. It follows then that California's community property law (Cal. Civ. Code, Section 164), can confer no right on plaintiff to share in the proceeds of the policy at bar.
>
> "My learned colleague Judge Harrison so held with respect to the community property law of Texas in James v. United States, et al., D. C., S. D. Cal., 1947."

The case of *James v. United States* has been discussed in our brief, and it is therefore unnecessary to refer to it at any greater length.

If Judge Mathes intends by his final statement quoted above to indicate the opinion that the Congressional Act

in question forecloses the right of a California wife to enforce her community interest against one who has received community funds under a national insurance policy, we are firmly of the opinion, as already indicated, that his decision is contrary to the act and contrary to constitutional provisions.

The two Federal decisions on this matter, namely, *Barton v. United States* and *James v. United States*, are the decisions of trial courts in the Federal Judicial system, and while we do not wish to detract from the importance of the position of Federal District Judge, we assume that the Federal Trial Court has approximately the same position in the Federal Judicial System as that of the Superior Court in the State Judicial System.

Most of the cases cited in the opinion rendered by Judge Mathes in *Barton v. United States*, supra, are cases involving an attempt on the part of a creditor, a taxing agency, an heir, or some other persons to enforce a right that has not heretofore existed in the proceeds resulting from veterans' insurance. The case now before the Court presents practically a reverse situation. The contention of the appellant must be that although the proceeds of the policy were community property in which under the laws of California the wife had a fixed right, the Act of Congress takes away that existing right and completely destroys it.

As we pointed out in our brief, the case of *Lynch v. United States* (see page 46 of Respondent's Reply Brief) held that the veteran's contract of insurance with the United States is property. The pleadings admit and the evidence shows that this particular piece of property was the community property of the insured and his wife. It logically follows from this statement of facts that the question is did the Congressional Act intend to take away this existing property interest of the wife, and if it did intend to, was it necessary and proper to the execution of the power delegated to Congress by the United States Constitution.

The United States Constitution, Article I, Section 8, Cls. 12 gives Congress power "to raise and support armies • • •"; Cls. 13, "To provide and maintain a navy."; [illegible]

Cls. 14, "To make rules for the government and regulation of the land and naval forces."

We assume that the insurance program for veterans is constitutional because it is necessary and proper for carrying into execution the powers last mentioned.

Veterans' insurance obviously was enacted to provide for veterans' dependents, and first among those dependents in the permitted class of beneficiaries was listed the wife of the veteran. Hence, the eventual sharing by the wife in any fund created by the insurance could scarcely be outside the purpose of the insurance.

Women have always borne a heavy burden in the wars fought by this country. Theirs has been the heart-breaking task of remaining at home, away from the excitement and activity of the war itself, doing the less glamorous tasks, and suffering the agonies of uncertainty as to the fate of their men. How anyone can say it is necessary and proper in maintaining armies and fighting a war to enact federal legislation that will unsettle the property rights of women in the many community property states and make them less secure and more uncertain of their position during war times is something we do not understand. Any portion of the Congressional Act here in question that is not necessary and proper to the prime object of raising and supporting armies, or making rules for the government and regulation of the land and naval forces appears to us to be beyond the power of Congress.

As we view the decisions rendered by Judge Mathes and Judge Harrison, we are impressed with the fact that they fail to consider the broad and sweeping effect of their conclusions. They are considering the one case before them at that time and forgetting the fact that their language, if followed, would destroy community property interests of women in California in policies of insurance that have been in existence in many cases for twenty to thirty years. They are forgetting that, modestly speaking, hundreds of thousands of dollars of women's community property interest would by their decision be annulled in each community property state. This matter has gone beyond the controversy between Margaret Wissner and the mother of the deceased Leonard Wissner, and now involves the rights of all women in all community property states that have by

the laws of those states an existing property interest in converted veterans' insurance.

We conclude this memorandum by again repeating a portion of the opinion of Chief Justice Hughes taken from the case of *Savage v. Jones*, supra:

> "*If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.* * * *
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. *In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*" (Italics ours.)

Can it be said that the purpose of the act cannot be accomplished or that its operation within its chosen field will be frustrated unless the community property rights of women in community property states are destroyed? Is it not rather true that the Congressional Act here in question is not in actual conflict with the law of the state if it is fairly interpreted, and that therefore the right of the plaintiff and respondent in this case to enforce her community property interests against the defendant, who has received and used community property without any consideration therefor, should be enforced by the courts of California?

We trust that the discussion of the only reported decision on this subject, which we are submitting herewith, may be of some aid to this Court in determining a question that so vitally affects the recognized property rights of women in all community property states.

Dated, Modesto, California, November 1, 1948.

Respectfully submitted,

CLEARY AND ZEFF,
By LESLIE A. CLEARY,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET V. WISSNER,
Appellee

MOTION FOR AFFIRMANCE OF JUDGMENT OF STATE COURT AND DISMISSAL OF APPEAL

Filed: —— day of ——, 1949.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Comes now the appellee, Margaret V. Wissner, and moves the court for an order affirming the judgment of the District Court of Appeal of the State of California, Third Appellate District, in the case of Margaret V. Wissner, Plaintiff and Respondent *vs.* Louise M. Wissner and Leandous H. Wissner, Defendants and Appellants, Civil No. 7528, Sacramento No. 5936, which judgment was filed on the 21st day of January, 1949 and affirming the judgment of the Supreme Court of the State of California denying a hearing in said matter, which said order of the Supreme Court was made and entered on the 21st day of March, 1949.

Said appellee, Margaret V. Wissner, further moves this Honorable Court for an order dismissing the appeal of the appellants herein.

This motion is made on all of the papers, records, and files transmitted to this court from the District Court of Appeal of the State of California, Third Appellate District, and upon the Statement Disclosing Matters and Grounds Making against the Jurisdiction of this Court filed herewith, and on such other records, files, and things as it may be appropriate for this court to consider.

Dated this 31st day of May, 1949.

MARGARET V. WISSNER,
Appellee,
By LESLIE A. CLEARY,
Of Cleary and Zeff, her Attorneys.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER and LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee.

Appeal from the District Court of Appeal, State of California, Third Appellate District.

Hearing Denied by the Supreme Court of the State of California.

APPELLEE'S BRIEF.

THE FACTS.

1. While the facts in this matter were summarized in our statement opposing jurisdiction (page 2), for completeness sake we repeat them here as briefly as possible.

2. The original complaint in this action, in addition to the cause of action covering the insurance policy, sought recovery of one-half of certain community funds accumulated from the pay of the deceased soldier, Major Leonard O. Wissner, and turned over to his parents to be utilized for the purchase of bonds for one Naomi Beiler and to recover one-half of certain other community property delivered into the hands of his parents, all without consideration. The judgment in favor of the plaintiff on this cause of action was not appealed from and is not before this Court. (R. 19 and 20.)

3. The second cause of action was for recovery of the wife's vested half interest in the proceeds of a National Service Life Insurance Policy purchased by the deceased soldier and paid for from his earnings as a major. Recovery was sought against the beneficiary after receipt of the funds and there were no parties to the action except the wife as plaintiff and the mother and father, who were named as beneficiaries, as defendants. (R. 3, 11 undenied.)

4. Margaret V. Wissner and Leonard O. Wissner were married in the State of California in August, 1930, and continued as husband and wife and continued at all times as residents of and domiciled in the State of California up to the date of death of the said Leonard O. Wissner. After marriage plaintiff continued her work as a nurse and contributed her earnings to the community for many years while her husband completed his medical training. (R. 20.)

5. Leonard O. Wissner died testate while serving as a major in the United States Army on November 14, 1945. (R. 18.)

6. The National Service Life Insurance Policy in question was for the sum of $10,000 and was without consideration payable on the death of the soldier to the appellants, mother and father of the deceased. (R. 12-13.)

7. The plaintiff appellee did not at any time know that the deceased soldier had named anyone other than herself as beneficiary, had never consented thereto, and had never consented to the application or use of community funds for the payment of premiums on said insurance policy. (R. 13 and 18.)

8. All of the premiums on said policy were paid with community funds. (R. 13-14 and 18.)

9. Under California law, the proceeds of said insurance policy were and are the community property of appellee Margaret V. Wissner and the deceased, Leonard O. Wissner. (R. 13, para 7.)

10. The defendants, as beneficiaries, received moneys from the United States government under said insurance policy as set forth in the findings of fact of the trial Court. (R. 14.)

11. The litigants in the case were residents of California, appeared in the trial Court in California, and submitted to the jurisdiction thereof. (Appears from entire Record.)

The fact that the premiums on the insurance were paid with community funds is admitted by the plead-

ings (see allegations in complaint, Paragraph 2, first cause of action (R. 3), and answer thereto (R. 8), Paragraph 2, where appellants allege that premiums were paid from the pay of the deceased as an officer of the army but make no denial of the allegation by the appellee in her complaint that the earnings were community property). Parenthetically we add to this statement of facts a comment on appellants' brief in opposition to motion for affirmation of judgment. At page 25 of that brief we find a statement that the appellee as the widow of the deceased had already received half of his estate and property left in joint tenancy. No such facts are in evidence in this case and counsel's reference to the matter is just as improper as it would be for us to report the fact that the wife has been rendered desperately ill as a result of this controversy.

SUMMARY OF ARGUMENT.

The argument which is found in the succeeding pages, we briefly summarize as follows:

First. It is our belief that this Court should not take jurisdiction of the present controversy for at least two reasons, namely:

1. The specifications of error made by counsel for appellants are all based on the bald statement that the decision of the California Court deprived the appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. This position seems to us to be completely untenable because of

the well recognized rule of law that a person who has been fully heard in the course of regularly conducted and fully completed judicial proceedings is not, by a judgment therein, deprived of property without due process of law even though the judgment may be erroneous.

2. In this action the plaintiff seeks no relief against the United States of America or any of its representatives or agents. The veterans' insurance program, as set up by Congress, is completely and wholly unaffected by the decision of the California Appellate Court and there is, therefore, no federal question involved in this particular matter. The case is distinguished from all other cases of similar nature that appear in any printed reports by the fact that the United States is not a party and is not affected by the decision and has no interest in it.

Second. In the event the Court takes jurisdiction of this matter, it is advisable to first recognize the importance of the problem presented. Any tendency to think only of the simple situation where a veteran dies during service, having paid all of the premiums from his soldier's pay, should be avoided with the realization that if the contention of the appellants is sustained, vested community property interest of thirty years standing in policies issued to veterans of the first World War will be placed beyond the reach of the wife even though she may have contributed to the accumulation thereof over the entire elapsed time. Likewise, if a decision favorable to appellants is had it must necessarily contemplate the fact that the

soldier may utilize any part of the community property whether accumulated before the war or not, to invest in any type of insurance policy that may be provided for by congressional act, even a one premium policy, thereby destroying long existing vested rights of the wife in their entirety.

Third. Appellants do not contend that the character of the property in this insurance policy is changed from community to separate, but only contend that the wife's remedies in the State Courts have been destroyed. In order to sustain this position they place their sole reliance on four lines of Section 454a of the World War Veterans' Relief Act as follows:

> "And shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary."

Appellants, in order to support their contention, must take the position that this particular language is to be construed to the effect that no process of any kind, under any circumstances, can reach the proceeds of the insurance at any time.

Fourth. Such a position cannot be supported by authority because it is contrary to the leading decisions on the point. For a great many years, in both the federal and state Courts, it has been recognized that community property laws are applicable to veterans' insurance and that the proceeds of veterans' insurance are subject to Court process to enforce the payment of family obligations. Many cases are cited by us on this point in our argument, but perhaps the

most outstanding are *United States v. Robinson*, *Schlaefer v. Schlaefer* and *Succession of Lynch*, the citations for which cases will be found in subsequent portions of this brief.

In our judgment, these decisions completely destroy the position of the appellants that Court process can never reach the proceeds of veterans' insurance.

Fifth. The proceeds of the insurance policy in question were and are community property. This is admitted by the pleadings and established by all the authorities. The appellee's right to one-half thereof is a vested right. This likewise is specifically established by the Code provisions of the State of California and recognized by all of the authorities, hence, if Section 454a is construed as destroying the wife's right to obtain her property or protect it through the intervention of the state Courts that portion of the section is invalid under the Fifth Amendment to the United States Constitution.

Sixth. It is the duty of the Court to construe this section in such a way that it will not be in conflict with the Constitution and it should not be construed as destroying a constitutional right or in conflict with the state law unless the purpose of the Act cannot otherwise be fully accomplished. It is entirely reasonable to construe the section as exempting the proceeds of the insurance from taxation and from the claims of outsiders, such as creditors, but permitting the wife and children to protect their rights in the state Courts as against beneficiaries if the proceeds have been paid

to them. This construction will in no way disturb the congressional plan for veterans' insurance.

Seventh. It seems to us to be apparent that Congress had no intention to destroy the rights of the wife to protect and secure her vested community property.

Congress specifically mentioned the two exemptions which it had in mind, namely, exemption from taxation and exemption from claims of creditors. The language following these two specific exemptions is general and under the ordinary rules of statutory construction would be limited by the specific phraseology preceding it.

Since Congress saw fit to specifically mention the two exemptions above referred to, it seems unlikely that they would have failed to specifically include the destruction of the wife's rights if they so intended as that would have been a step of far greater severity than the other two.

Congress had the question of the extent of the exemptions under consideration after the decision in the case of *Pagel v. Pagel,* in 1935 and again in 1940. With many decisions subjecting the proceeds of insurance to family claims preceding those dates Congress did not see fit to add any clause covering the destruction of family rights.

Eighth. This nation has always recognized and realized the substantial contribution to the cause of war resulting from the courage, faith and energy so

freely given by the wives of soldiers and a destructive blow to the vested marital rights of millions of American women could, under no circumstances, be regarded as aiding in the cause of prosecuting a war.

ARGUMENT.

I.

THE SUPREME COURT SHOULD NOT TAKE JURISDICTION.

(a) None of the specifications of error made by counsel for appellants can be sustained as the same are phrased in the typewritten copy of appellants' brief which has been served on us.

The specifications of error appear on pages 12-15 of appellants' brief.

Every specification of error set forth by the appellants is based solely on the contention that the Courts of California by the decision in this case *"deprived the appellants of their property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States"*.

This exact phraseology is repeated in each of the seven specifications of error and is the basic contention in each one of said specifications of error.

This case was instituted in the Superior Court of Stanislaus County, California, in accordance with the statutes and legal provisions of that state for the filing of actions of this character between citizens. The defendants appeared in the action and submitted them-

selves to the jurisdiction of the Court. Every step of the proceeding in the commencement, trial, appeal, and final denial of a hearing by the Supreme Court of California was had in accordance with the statutes and laws of California. At every step of the proceeding the defendants appeared, made no objection to the process for the determination of their claims as provided for by California law, and awaited the final judgment of the Supreme Court of the state.

The appellants gambled on a favorable decision and not having obtained such a decision, now seek to claim as the *only error that the Courts of California deprived them of their property without due process of law contrary to Section 1 of the 14th Amendment to the Constitution of the United States.*

It is an elementary principle of law that where the judicial process is employed and the litigants follow out such orderly process for determining their rights in the Courts, the loss of property by the decision of the Court cannot be an infringement of the provisions of Section 1 of Article 14 of the Constitution of the United States.

Patterson v. Colorado, 205 U. S. 454 at 461, 51 L. Ed. 879,

where Mr. Justice Holmes said:

> "In general, the decision of a (state) court upon a question of law, however wrong and however contrary to previous decisions, is not an infringement of the 14th Amendment merely because it is wrong or because earlier decisions are reversed."

Central Land Company v. Laidley, 159 U. S. 103, 112, 40 L. Ed. 91:

"When the parties have been fully heard in the legal course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law."

Since the time of the above decisions the rule therein stated is so well recognized that there appears to be little additional authority, but see

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382

(b) The United States was not a party to this case, was not affected by the decision, and has no interest in it.

In all other cases considered by any Court of last resort or any of the lower federal Courts, the United States or a federal officer or department has been made a defendant and relief has been sought that would require the payment of benefits under the insurance direct to some person other than the beneficiary named in the policy.

The position which we have maintained at all times in this case distinguishes it completely from the contentions made in all other cases reviewed in the higher Courts. We have not sought to have a state Court interfere in any way with the carrying out of the veterans' insurance program to the full measure as provided by the Congressional Act. We have not asked that the United States government or any of its representatives be required to do any act or to refrain from doing any act. *We have maintained only*

that the state Court has the right to entertain litigation between citizens of the state over the proceeds of a veteran's insurance policy after they are in the hands of the beneficiary.

The decision of the trial Court and of the Appellate and Supreme Courts of the State of California recognizes fully the fact that federal agencies cannot be interfered with in completing all their duties under a veterans' insurance policy and the laws appertaining thereto, including the payment of the benefits to the named beneficiary.

Nothing in the decision in this case in any way changes or affects the rights or duties of the federal government and its agents from the very inception of a soldiers' insurance plan to the performance of the last act that the federal government is obligated to perform, namely, the payment of the benefits to the beneficiary.

A holding contrary to the decision approved by the Appellate and Supreme Courts of the State of California would require reading into the Act language which is not there.

II.

THE VALIDITY OF THE CONGRESSIONAL ACT PROVIDING FOR NATIONAL SERVICE LIFE INSURANCE IS NOT QUESTIONED.

Counsel for appellants, in their brief, page 17, still contends that Congress has the power to provide insurance for the members of the armed forces.

This fact has been conceded at all stages of this litigation, as will be observed from page 5 of our statement opposing jurisdiction.

Justice Adams, in her opinion, certainly did not question the right of Congress to provide for National Service Life Insurance but merely pointed out that if Courts endeavored to read into the Act language which is not there, as contended by appellants, it would deprive soldiers' wives in community property states such as California of their vested property interests and concluded that such an extension of the Act by judicial interpretation would be invalid under the 5th Amendment to the United States Constitution. (R. 22 to 28.)

III.

THE IMPORTANCE OF THE PROBLEM PRESENTED IN THIS PARTICULAR CASE IS FAR GREATER THAN THE CASE ITSELF INDICATES.

From reading the few opinions touching on this question, we gain the impression that the Courts considering the matter have confined their attention more or less to the situation where a soldier dies in service or immediately thereafter and all of the premiums on the policy have been paid from his compensation as a soldier. *It seems to us that there has been a failure, at least on the part of some Courts, to realize that this problem is of tremendous scope so far as community property is concerned.*

Since the United States has been in the business of writing insurance policies for soldiers, we have had two wars, one of which occurred 30 years ago. California soldiers of World War I (the same applies to soldiers of any other community property state) have maintained their veterans' insurance in force and effect with the help of their wives and paid premiums on those insurance policies out of community property of all kinds—possibly dividends from stock, rentals from buildings, earnings of the husband and wife—and other sources belonging to the community, for a period of over 30 years. During that time the wife, by virtue of the community property law, has accumulated a vested estate of important proportions. Those policies have been maintained by the husbands and wives in community property states not because of any military connections and not because of the furtherance of any war necessity, but for the purpose of building up a safe and dependable community estate through an ordinary business contract with the United States carried out by the latter at no profit and no loss. Many of these policies, like my own, are now ready to mature and bring into the community a not inconsiderable amount of cash.

A decision in this case upholding the contention of the appellants would mean that the California veterans of World War I could, by change of beneficiary, or for that matter, where they are themselves named beneficiaries, by obtaining the cash proceeds and holding them in their own name, deprive the wife who has aided in making the investment over a period of 30 years of all of her vested rights.

If it be held that the state cannot give Margaret V. Wissner the relief she obtained in this action, then if a veteran of World War I sees fit to give away the proceeds of his 30-year-old policy to some beneficiary other than his wife, the California Courts can afford her no protection against such an act in fraud of her interests.

If Congress in this instance can take away the vested community rights of the wife because the United States is contracting with her husband, then Congress can just as well take away the vested rights of the wife of a postal employee because he is contracting with the United States government, or the rights of a wife whose husband is engaged in interstate commerce because interstate commerce is a matter that is subject to federal control and regulation.

If Congress can take away the vested rights of the California wife in this case, then why could it not authorize the soldier going to war to pay to his government (secretly and without his wife's consent) all of his earnings plus any other sums from accumulated community property for the purchase of a one-premium insurance policy payable to himself on maturity or to his mother or father in the event of death, thereby defrauding the wife of all her property.

The difference in these situations is but a difference in degree. In this particular instance it is contended that Congress can take the wife's recently accumulated property at the rate of $5, $10, $20, or $50 a month while in the instance just mentioned it would merely

mean taking, as well, earlier accumulations in large sums.

The instances we have given and the possibilities we have suggested may be inept but we believe they will serve to emphasize the importance of the problem to be decided in this case and to direct attention away from the simple situation where the policy matures because of the death of the soldier during his military service the premiums being paid only from his community earnings as a soldier.

IV.

COMMUNITY PROPERTY LAWS ARE RECOGNIZED AS APPLICABLE TO VETERANS' INSURANCE POLICIES AND THEIR PROCEEDS.

Preliminary to a brief discussion of this point, we call attention to the fact that appellants filed as Appendix B to their statement of jurisdiction and referred to on pages 38 and 39 of their brief, *Johnson v. Shelton*, a decision of the Superior Court of Los Angeles County, California, by Judge Clarence Hanson.

Judge Hanson's decision in this case was the fourth Superior Court decision on the point, being preceded by 3 contrary decisions, namely, *Corabelle Bennett v. Modesta Lee Bennett*, decided by Judge Myron Westover on March 20, 1946, in the Appellate Division of the Los Angeles Superior Court; *Wissner v. Wissner*, the present case, decided by Superior Court Judge B. C. Hawkins of Stanislaus County; and

Carballo v. McFann, decided by Judge Otto Emme of the Los Angeles Superior Court on November 5, 1949. Judge Hanson's decision in *Johnson v. Shelton* was also preceded by the decision of the California Appellate Court in *Wissner v. Wissner*. Judge Hanson of Los Angeles Superior Court not only overruled the Appellate Court of California, but also overruled his two associates on the Superior Court bench in Los Angeles, one of them, Judge Myron Westover, having made his decision in the Appellate division of that Court.

We may say, however, that if the opinion of Superior Judge Hanson in the *Johnson* case is to be considered, it should also be remembered that the Supreme Court of California, approximately three weeks after Judge Hanson's decision, overruled him by denying a hearing in the *Wissner* case. (R. 30.)

In *United States v. Robinson*, 40 Fed. (2d) 14, it was held that the state law of Louisiana should apply in determining the rights as between a legal and a putative wife.

Succession of Lynch v. United States, 17 Fed. Supp. 674, cites *United States v. Robinson* and takes the same position. It is likewise worthy of note that in this case, at page 676, it is recognized that the proceeds of the policy are community property where the premiums are paid with community funds. We quote the following from the decision:

> "In default of a named beneficiary, proceeds of this policy fell into the community, *since it was taken out and the premiums were paid during the*

existence of the good faith relation which ended only at the death of Silas Lynch (the soldier). *The policy was thereby matured and Emma Lynch became the owner of one-half of this community estate* * * *" (Italics ours.)

United States v. Primilton, 76 Fed. (2d) 555. Here again the case of the *United States v. Robinson*, supra, is cited with approval and the opinion shows that the United States in prosecuting its appeal from the District Court of the United States for the Western District, took the position that the character of the proceeds of the insurance was to be determined by Louisiana law and that it was the property of the community.

Other cases supporting the contention that the character of the funds is to be determined by state law are:

United States v. Rose (Tex.), 57 S. W. (2d) 350, where it was held that since premiums were paid from community earnings one-half the insurance belonged to the widow. In this case *United States v. Robinson*, supra, was cited with approval.

Succession of Jones, 185 La. 377, 169 So. 440, cited *United States v. Robinson* with approval and found that premiums were paid during wedlock out of soldier's pay; that the soldier and his wife were residents of a community property state and decided that the insurance became a community estate and the wife was entitled to one-half as the surviving spouse in the community.

The appellants in this case place some reliance on *James v. United States* (S. D. Cal. 147 unreported). (Appellants' Brief p. 39.) As we view this case any remarks made by Judge Harrison contrary to the decision in *Wissner v. Wissner* are purely dictum and the decision itself has no bearing on the situation that now confronts your Honors.

The case involved the Texas law of community property under which the wife has no *vested* interest in life insurance purchased with community funds as *she definitely has under California law. The wife's interest in Texas is but an expectancy as she must show not only that the premiums were paid by the husband with community property and another person named as beneficiary, but she must also show the express intent of the husband to defraud her.*

Appellants likewise rely on the case of *Barton v. United States*, 75 Fed. Supp. 703. However, as we pointed out at page 2 of our analysis of this case (which analysis is attached as Exhibit A to our statement opposing jurisdiction), Judge Mathes was not called on to decide the question now before this Court, namely, the rights of a wife to obtain her community property from an individual beneficiary then in possession thereof, and his language concerning that matter must be regarded as dictum. The problem confronting him was whether or not the United States or its representatives could be forced to pay the proceeds to one other than the named beneficiary.

Quite recently *Pack v. United States*, 176 Fed. (2d) 770, was decided, holding that the widow could not

prevent the payment of proceeds of insurance by the United States to the beneficiary or require the United States to pay the same to her. The Court further held that it did not have jurisdiction to determine the claim of the widow to the effect that because of her community property interest the funds in the hands of the beneficiary should be impressed with a trust, thus avoiding the question that is presented in this particular case.

The California case of *Kaufman v. Kaufman*, 93 ACA 966, decided September 29, 1949, by the District Court of Appeal, Fourth District of California, held that where in a property settlement agreement with his wife the veteran husband agreed to name her as beneficiary, and under certain circumstances name their children, the agreement constituted an assignment contrary to the provisions of The World War Veterans' Relief Act and that where he changed the beneficiary to name a new wife after divorcing the wife with whom the settlement was made, the first wife could not enforce the provisions of the property settlement agreement in question.

In this case the property involved was treated as separate property since there was no evidence that premiums had been paid with community funds and the *Court specifically distinguished the case from Wissner v. Wissner by pointing out that the record in Kaufman v. Kaufman was silent as to the source of the premium payments and therefore a community property question was not involved.*

We further observe that in the case of *Nobles v. Cannell*, decided in the Superior Court of Los Angeles by Judge Ben V. Curler (referred to in Appellants' Brief) (after the interposition of the United States Attorney), Judge Curler finally arrived at a decision contrary to our position. However, he first wrote a very excellent and well considered opinion deciding the case in favor of the wife in exact accord with our contentions. A portion of this opinion is made a part hereof as the appendix.

We believe that it is clear that community property statutes have been repeatedly applied not only in state Courts but in federal courts in determining the question of the rights under and the proceeds from veterans' insurance policies.

V.

THE PROCEEDS OF THE INSURANCE POLICY IN QUESTION ARE COMMUNITY PROPERTY AND THE WIFE HAS A VESTED INTEREST THEREIN.

(a) Proceeds community property.

As nearly as we can understand the contentions of appellants, it would appear that they admit the proceeds of the insurance policy are community property; that they do not contend that Congress changed or made any effort to change the character of the property but rather contend that Congress destroyed the remedies of the wife so that she could not obtain the property which admittedly belonged to her.

We say that appellants apparently admit that the proceeds are community property due to the fact that their pleadings, as previously pointed out, admit that the premiums were paid with the earnings of the deceased and that the earnings were the community property of himself and his wife. (R. 3, Paragraph 2 of plaintiff's complaint not denied by answer.)

The fact that the earnings of the soldier are community property is also settled in the decision of *French v. French*, 17 Cal. (2d) p. 775 at p. 777, 112 P. (2d) 235, where the California Supreme Court specifically states that the earnings of the husband while serving in the Navy and up to the time of the dissolution of the marriage, are the property of the community.

This being true, it follows as an inescapable corollary that an accumulation resulting from the investment of the earnings is likewise community property.

Grimm v. Grimm, 26 Cal. (2d) 173 at 175, 157 Pac. (2d) 841:

"All premiums were paid with community funds and the policy was therefore community property * * *"

Travelers Insurance Company v. Fancher, 219 Cal. 351, 26 Pac. (2d) 482;

New York Life Insurance Company v. Bank of Italy, 60 Cal. App. 602, 214 Pac. 61.

The fact that the proceeds of the policy are community property is also settled by the findings in the trial Court. (R. 13, paragraph 7.) We assume that

this finding, in view of the clarity of the law on the situation, would not be questioned at this time.

We stated a moment ago that counsel for appellants apparently do not contend that Congress attempted to change the character of the property but only contend that Congress took away the wife's remedy. We might say further that we have been unable to find any language in the Congressional Act involved that could possibly be construed as changing the proceeds of the insurance to separate property rather than community. The only language relied on by the appellants is found in Section 454a of the World War Veterans' Relief Act, Title 38, USCA (49 Stats. 609) having to do with exemptions. Certainly this language does not in any way affect the character of the proceeds of the policy as separate or community.

(b) Wife's interest is vested.

Counsel for appellants contend "appellee's claimed rights in the case at bar are not vested". (Appellants' Brief p. 24.) Such claim is completely contrary to the law of California and the decisions interpreting it.

It is first to be noted that this Court in the case of *Lynch v. United States*, 292 U. S. 571, 78 L. Ed. 1438 (Mr. Justice Brandeis delivering the opinion), held that veterans' insurance policies (then "war risk policies") "are property and create vested rights". In the same case Justice Brandeis said

> "war risk insurance policies are contracts of the United States. As consideration for the government's obligation, the insured paid prescribed monthly premiums * * * the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents."

It is true that prior to the amendment of the community property laws of California in 1927 Mr. Justice Holmes in *United States v. Robbins*, 269 U. S. 315, 70 L. Ed. 285, held that a wife's community interest was a mere expectancy and not a vested right and that therefore a separate tax return should not be filed by her.

In 1927, however (the Wissners were married in 1930, R. 20), Section 161A was added to the Civil Code of California providing that

> "The respective interests of the husband and wife in community property *during continuance* of the marriage relation *are present, existing, and equal interests* under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property". (Emphasis ours.)

So far as we know, since the enactment of Section 161A in 1927, no Court has ever questioned the fact that the wife's interest in community property is vested.

In *United States v. Malcolm*, 282 U. S. 792, 75 L. Ed. 714, it was determined that since the enactment of

Section 161A the wife should file a separate income tax return contrary to the determination of Mr. Justice Holmes in the *Robbins* case prior to the amendment. (See also *Commissioner of Internal Revenue v. Harmon*, 323 U. S. 44 at 48 (89 L. Ed. 60 at 63).

In *Bank of America, etc. Association v. Mantz*, 4 Cal. (2d) 319, 48 Pac. (2d) 662, the California Supreme Court said:

> "a wife, since 1927 at least, has had a present existing and equal interest in the community property although the management and control thereof is at all times in the husband. (Section 161A, Civil Code.) The only limitation upon the wife is that she must act through her husband."

Opinion of Justice Adams in this case and federal cases there cited (R. 23):

> "It cannot be denied that since the enactment of Section 161A of the California Civil Code in 1927 a wife in this state has a vested interest in one-half of the earnings of the spouses since that date. Such rights have been recognized by both federal and state courts. See Lang v. Commissioner of Internal Revenue, 304 U. S. 264 (58 S. Ct. 880, 82 L. Ed. 1331, 1336, 118 A.L.R. 319); United States v. Malcolm, 282 U. S. 792 (51 S. Ct. 184, 75 L. Ed. 714); Commissioner of Internal Revenue v. Harmon, 323 U. S. 44 (65 S. Ct. 103, 89 L. Ed. 60, 63, 67); Poe v. Seaborn, 282 U. S. 101 (51 S. Ct. 58, 75 L. Ed. 239, 243); United States v. Pettigrew, 81 F. 2nd 666."

We digress here to comment on the observations of counsel for appellants, which we quote as follows:

"His wife certainly had no present right of enjoyment of this money (the husband's earnings); if he lost it gambling or spent it sightseeing, she would have had no recourse against anyone." (Appellants' Brief p. 28.)

It is our belief that counsel's first statement is erroneous. The wife does have a present right of enjoyment of the husband's earnings. In fact, if he fails to recognize her right to enjoy a reasonable portion of that money for her support, maintenance, and pleasure, the Courts of California and probably the Courts of most states in the union, will incarcerate him in the county jail. We agree that if the husband lost the money gambling or spent it sightseeing, the wife probably would have no right of action against anyone. If we desired to be super-technical, we might observe that under certain circumstances in the State of California (where most forms of gambling are illegal) a wife might have a right of action against a gambler who took the community earnings from her husband but that is entirely beside the point. We recognize the husband's right of management of the community property. We will concede for the purpose of this argument that he has a right to gamble the money and that if he loses it the wife has no recourse. On the other hand, it is quite obvious that if the husband gambles with community funds and wins, the wife's community interest attaches to the winnings the same as it would attach to any other investment. Investing funds on a crap table is only slightly less of a gamble than investing them in a

term insurance policy. The only difference is that is one instance the investor may live to enjoy his winnings while in the other instance he must die to permit someone else to enjoy the fruits of his investment. His dying does not change the fact that the proceeds of the investment of the community funds remain community property and that the wife's interest therein is vested.

When Leonard and Margaret Wissner entered into the contract of marriage in California, under California law, and chose to make this state their residence and domicile, the wife under that contract had an immediate vested interest which became specific and certain as moneys were earned or accumulated. Likewise, the husband had an immediate vested interest in the earnings of the wife. *At the end of each month of Major Wissner's service, or, we might say, at the end of each day, as he became entitled to compensation, the wife's interest, in the amount of compensation to which his employment contract with the United States entitled him, vested and she was the owner of one-half of that compensation, subject only to the right of the husband to manage it.*

Counsel on the same page of their brief (p. 28) makes the further observation that if Major Wissner had invested his money in government bonds, naming his mother as the surviving owner, the Courts of California would have honored the contract. Counsel cited Section 704 of the Civil Code of California and two Appellate Court cases, namely, *Conrad v. Conrad*, 66 Cal. App. (2d) 280, 152 Pac. (2d) 221, and *Davies v.*

Beach, 74 Cal. App. (2d) 304, 168 Pac. (2d) 452, in support of this statement.

Neither of the cases cited are authority for counsel's statement. In both instances the funds invested were the separate property of the investor. In *Davies v. Beach*, supra, the contention was made that the funds were community property and the Court spent some time disposing of that question before deciding the case. It was only after the Court determined that the evidence showed that the funds were separate property that a decision was rendered against the wife.

The latest case on this particular subject is the case of *Katz v. Driscoll*, 86 Cal. App. (2d) 313, 194 Pac. (2d) 822. In this case one Michael Dolan, who died testate on August 2, 1946, had applied to the State Department of Social Welfare of California for old age security benefits in each of four years—1943 to 1946 inclusive. In each year Dolan asserted he was eligible for such security and did not have personal property the net value of which exceeded $600. The State Department of Social Welfare therefore granted him old age security benefits in the total sum of $3700. At the date of his death it developed that he did have property worth more than $600 in each of the 4 years and that he held government bonds in the amount of $2250, made payable to himself or, in the event of his death, to certain other persons.

The plaintiff in the case was the administrator of the estate of the deceased Dolan who brought suit for

the recovery of the bonds in order to pay claims filed by the state.

The lower Court sustained a demurrer on the basis of the provisions of Section 704 of the Civil Code of California and the regulations of the United States Treasury Department which, in substance, provide that where a surviving owner is named in a bond it shall be conclusive of his ownership and the Treasury Department will recognize no notices of other claims.

The Court considered both the cases cited by counsel for appellants, namely, *Conrad v. Conrad*, and *Davies v. Beach*, but came to the conclusion that the language of the Civil Code of California and the regulations of the Treasury Department could not protect one who was guilty of a breach of trust or fraud in purchasing the bonds in question. The Court, at page 322, said:

> "These laws and regulations are not intended to confer on the beneficiary the right to retain permanently the proceeds from the bonds irrespective of fraud *or any illegality* in the manner in which the bonds were obtained. To hold otherwise would, in effect, say that the treasury regulations not only guarantee payment to the named beneficiary, but, thereafter, when he receives the proceeds, follow him around indefinitely, and, like a protective halo, render him completely immune from any ordinarily legitimate claims thereto. *For the purpose of payment and performance of the government's contract obligation, the beneficiary is recognized as the 'sole and absolute' owner.* But *the 'rights of survivorship conferred by these (treasury) regulations upon a surviving coowner*

or beneficiary' (Paragraph 315.13 (1)) terminate there."

In this opinion the Court cited the case of *Ibey v. Ibey*, 93 N. H. 434, 43 Atl. (2d) 157, wherein the widow, after the husband's death, took the position that he had purchased bonds for the purpose of disposing of a large portion of his personal estate in fraud of her marital rights and the Court held that regardless of the treasury regulations, the bonds or their proceeds were subject to a constructive trust in favor of the widow.

We believe the latest decision of the California Appellate Court in the *Katz* case is a proper statement of the law and that where a husband endeavors to defraud the wife of her community property interests by investing community property in government savings bonds or insurance and naming another as surviving owner or beneficiary the Courts will declare a constructive trust as against the survivor who has received the bonds or their proceeds or the proceeds of the insurance policy.

VI.

SECTION 454a, OF THE WORLD WAR VETERANS' RELIEF ACT DOES NOT BY ITS WORDING DESTROY THE RIGHT OF THE WIFE TO ENFORCE HER COMMUNITY INTERESTS IN THE STATE COURTS AGAINST THE BENEFICIARY.

(a) Specifically stated exemptions limit general language.

As we pointed out in our statement opposing jurisdiction at page 5, the argument of counsel for appellants in this case depends for support wholly and solely on three lines found in the above mentioned Section 454a, namely:

> "and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary."

Unless these three lines destroy the right of the wife to relief in the state Courts against the beneficiary, then her rights are not destroyed by the language of the act in question.

We discussed this situation at some length in our statement opposing jurisdiction, which we assume will be used by the Court in determining this matter, but since we are not familiar with the Court's practice in the use of the various briefs filed, and for greater convenience, we will set forth our thoughts on the subject in this brief.

It would seem well to note first what the Act of Congress *did not* say. Congress said the payments in question "shall be exempt from taxation, shall be exempt from the claims of creditors, * * *" but it did not say "shall be exempt from the claims of wives

for support, alimony, or property interests recognized by the laws of any state".

A well known rule of statutory construction is that general words in a statute followed by specific words or designations are usually regarded as limited by the specific language.

50 *Am. Juris.* 244:

> ***"Similarly, in accordance with what is commonly known as the rule of ejusdem generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be construed as restricted by the particular designation and as including only things or persons of the same kind, class, character, or nature as those specifically enumerated. The general words are deemed to have been used, not to the wide extent which they might bear if standing alone, but as related to words of more definite and particular meaning with which they are associated."*** (Emphasis ours.)

The above statement from American Jurisprudence is supported by recent decisions of the United States Supreme Court as follows:[1] *Caminetti v. U. S.*, 242 U. S. 470, 61 L. Ed. 442; *Fitch Co. v. U. S.* 320 U. S. 582, 89 L. Ed. 472, and *Cleveland v. U. S.*, 329 U. S. 14, 91 L. Ed. 12, where Mr. Justice Douglas said at page 18:

> "Under the ejusdem generis rule of construction the general words are confined to the claims and may not be used to enlarge it."

In this instance, the general words on which appellants rely are associated with and follow two

specific exemptions, namely, "from the claims of creditors" and "from taxation". We believe that unless a plaintiff's claim falls within one of those classes, that is, either a *debt* or a *tax*, the general words employed by Congress were not intended to be and should not be construed to bring a claim such as that of plaintiff within the exemptions.

(b) This position is fully supported by many decisions subjecting the proceeds of veterans' insurance policies to legal and equitable process both before and after they reach the beneficiary.

The two cases most frequently cited upon this subject are *Schlaefer v. Schlaefer*, 112 Fed. (2d) 177, decided in 1940 by the Appellate Court of the District of *Columbia* and *U. S. v. Robinson*, 40 Fed. (2d) 14, decided in 1930 (prior to the enactment of Section 454a by Congress) by the Fifth Circuit Court of Appeals.

While these two Courts in general reached the same conclusion, namely, that the proceeds of a veteran's insurance policy were not exempt from the claims of wives or other family claims, the reasoning was slightly different in each case.

In *United States v. Robinson*, the decision was based on the conclusion that state community property laws controlled the rights of the wife to the proceeds of the policy and that Section 454, the predecessor of Section 454a, did not affect her privilege of enforcing those rights.

In *Schlaefer v. Schlaefer*, Mr. Justice Rutledge based his decision on the conclusion that exemption

statutes such as 454a were never intended to and did not destroy or affect family obligations and that, therefore, the wife's right to resort to the insurance proceeds, for the purpose of satisfying her claims, still existed.

Some subsequent decisions utilize the case of *U. S. v. Robinson* as authority. These cases, namely, *Succession of Lynch v. U. S., Succession of Jones v. U. S., U. S. v. Rose* and *U. S. v. Primilton* have been cited and commented on in a preceding section of this brief. (See pages 17 and 18.)

Other cases have followed the reasoning of Mr. Justice Rutledge in *Schlaefer v. Schlaefer* and before mentioning them we would like to discuss this case somewhat more in detail. In this matter, Justice Rutledge was construing Section 16a of the Life Insurance Act of the District of Columbia, which provided that:

> "No money or other benefit paid, provided, allowed, or agreed to be paid by any company on account of the disability from injury or sickness of any insured person shall be liable to execution, attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such insured person * * *"

In writing the opinion Justice Rutledge said:

> "The basic issue boils down to whether Congress intended to relieve the disabled insured to the extent of his disability payments from legally enforceable obligation to support his family and

those legally dependent upon him. So far as general creditors are concerned the purpose is clear * * *

"An important, often the primary, motivation for taking out disability insurance is protection of the family, not merely of its supporter. As has been said, the funds are not earmarked for limited and particular purposes. They are derived normally from the insured's earning power * * * By law and the most sacred contract he is obligated to employ it, while it exists, for dependents' support * * * The obligation on which appellant's claim is based is not a 'debt' or a 'liability' in the ordinary usages of those terms. It is a duty of higher obligation. As has been said, it is not one within the usual purposes of exemption statutes."

It is to be noted that in our case the appellants were not dependents of the deceased while the appellee is a dependent.

Counsel for appellants, in their brief in opposition to motion of appellee for affirmation of judgment at page 24, claim that the exemptions of Section 454a are much broader than the exemptions of Section 16a of the Life Insurance Act of the District of Columbia which Justice Rutledge was considering.

This is a completely erroneous statement as is made clear by the opinion in the case of *In re Flannigan*, 31 Fed. Supp. 402, where it is pointed out that the exemption provisions under consideration in the *Schlaefer* case and those of 454a are practically identical.

Apparently appellants' counsel neglected to note the further provision of the District of Columbia Act to the effect that payments covered by it should not be liable to "execution, attachment, garnishment *or other process*". The words "other process" are certainly as broad as Section 454a and it therefore seems inescapable that Justice Rutledge took the definite position that such phraseology found in Section 454a does not defeat the rights of a widow and child.

Cases following the reasoning of Justice Rutledge are:

In re Flannigan, 31 Fed. Supp. 402. Here the divorced wife of a lunatic veteran sought the payment of alimony from funds received by him as disability compensation. The Court held that the provisions of 38 U.S.C.A. Sec. 454a did not exempt the veteran from the wife's claim and the Court said:

> "The judgment for alimony is not a debt in the ordinary sense. It is an obligation of a higher order * * * the purposes of the exemptions in this (case) were to protect not only the recipient of the benefits but to afford some degree of security to the family and dependents of such recipient. The enactment of these statutes had as their purpose, at least in part, to insure the public against the pauperism of the recipient of the benefits or that of his dependents. A divorced wife is a dependent no less in the status created by the divorce decree than in that fixed by the marriage bond. Congress did not intend to put such benefits beyond the reach of a divorced wife."

Certainly, if this be true, Congress did not intend to put the proceeds of insurance beyond the

reach of a wife's claim to vested property rights. There can be no valid distinction between a claim for alimony or support in monthly payments and a claim to the wife's interest in the property.

Hannah v. Hannah, 11 S. E. (2d) 779, 781. This case involved a claim for alimony and support by the wife against her husband, then 79 years of age, who was receiving $45 per month from the United States government as a result of the death of a son by his first wife in military service. The Court noted that these funds were protected by the provisions of 454a and called particular attention to the phrase in said section which reads "and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever". The Court then said:

> "We do not, however, view this additional language as extending the exemption beyond the claims of creditors and to thereby cover a claim of the character of alimony."

Also see

Bagnall's Guardianship, 238 Ia. 905, 29 N. W. (2d) 597.

In addition to the cases that specifically follow the reasoning of either the *Robinson* case or the *Schlaefer* case and arrive at the same result, there are numerous other cases arriving at a like result without citing either of these two leading authorities.

For example, it was held in the California case of *Gaskins v. Security Bank*, 30 C. A. (2d) 409, 85 Pac. (2d) 681, 685:

> "the beneficent purpose manifested in the act of Congress is to preserve the disabled soldier's fund against imposition on the part of designing people or depletion by the soldier's own improvidence * * *, but we cannot conceive that it was the purpose of the government to prevent the probate courts in guardianship proceedings from authorizing the application of these funds to the needs of the veteran's children * * * The obligation of a father to support his minor children is *not a debt* contemplated by this act of Congress, but is an obligation growing out of the parental status and public policy, the performance of which can ordinarily be compelled by imprisonment as well as judgment and writ of execution; and we cannot assume that the federal government ever intended to throw around these federal funds legal strictures that would permit or enable the beneficiaries thereof to refuse to discharge their duty to support their children."

This Court cited *Guardianship of Giambastiani*, 1 Cal. App. (2d) 639 (37 Pac. (2d) 142), where the claim of a guardian of a veteran for moneys advanced for him was approved and the Court said:

> "A claim of a de facto guardian for expenditures on behalf of the ward, set up in his subsequent accounting, *is not the claim of a creditor.*"

Stirgus v. Stirgus, 160 So. 285, holds that the word "creditors" in Section 454 superseded by Section 454a, contemplates an ordinary contractual obligation of statutory debt and not a claim arising by operation of law.

Other cases subjecting the proceeds of soldiers' insurance to Court process are as follows:

Arms Com. v. Arms, 260 Ky. 634, 86 S. W. (2d) 542;

Stone v. Stone, 188 Ark. 622, 67 S. W. (2d) 189;

Hollis v. Bryan, 166 Miss. 874, 143 So. 687;

In re Shinberg, 76 N.Y.S. (2d) 334;

In re Gardner, 264 N. W. 643.

Regardless of whether the above cases follow the reasoning of the *Robinson* case or the *Schlaefer* case or adopt a reasoning of their own, the decision reached by the Court in each case was the same, namely, that the proceeds of the veterans' insurance policies are not, as contended by appellants, completely exempt from Court process of all kinds and all times and under all circumstances, but rather that they are subject to Court process in many instances, under many conditions and particularly for the enforcement of the rights of the wife and the rights of the family.

It appears well established, therefore, from the decisions above cited that Section 454a does not mean what appellants contend for. It does not mean that the proceeds of veterans' insurance policies shall never be liable to Court process. The rights of wives to subject the proceeds to Court process is well established where the claim is based on family relationships. It seems quite naturally to follow that in a divorce action the proceeds of veterans' insurance in the hands of the veteran husband would be subject to the jurisdiction of the state Court not only for the

purpose of alimony but for the purpose of division where the same are community property. Division of community funds on hand by a state Court in a community property state is nothing more than a provision for the wife's support in a lump sum. If the state Court has jurisdiction to divide government insurance proceeds in the hands of the veteran between husband and wife in a divorce action, surely the same Court can protect the wife against a stranger.

VII.

THE SUPREME COURT OF THE UNITED STATES LIMITS PROVISIONS OF SECTION 454a.

In the case of the *United States Trust Company of N. Y. v. Helvering*, 307 U. S. 57, 83 L. Ed. 1104, the question presented to this Court was whether or not the proceeds of a veteran's insurance policy paid to his widow should be included in his estate for the purpose of assessing federal estate tax.

The widow contended that since the World War Veterans' Act of 1924 provided that insurance payments "shall be exempt from all taxation" and the amendment thereto in 1935 did not significantly change the situation, the proceeds of the insurance policy should not be included in the estate for federal taxation purposes. Mr. Justice Black in writing the opinion said:

> "Exemptions from taxation do not rest upon implication * * * in an analogous situation, fed-

eral bonds exempt by statute from all taxation have been held subject to a federal inheritance tax." (It seems reasonable that likewise destruction of property rights should not rest on implication.)

The opinion held that the proceeds of the insurance policy must be included in the estate of the veteran for the purpose of collecting federal taxes. It is true that Mr. Justice Black made the distinction that the tax was on the transfer rather than on the property and with this position certainly no one could quarrel.

It would seem to us that if the phraseology of the exemption clause referred to in the *United States Trust Company of N. H. v. Helvering*, namely, "shall be exempt from all taxation" was held to be not sufficiently explicit or broad to cover the case there under consideration, the language of Section 454a, which is not nearly as specific, cannot be said to cover the destruction of the wife's right to protect and enforce vested community property rights.

VIII.

CONGRESS DID NOT INTEND TO DESTROY THE RIGHT OF THE WIFE TO PROTECT AND SECURE HER VESTED COMMUNITY PROPERTY.

We have already pointed out that there is nothing in the language of the Act specifically accomplishing such a purpose. We believe there are certain circumstances and considerations that rather clearly demonstrate the fact that Congress *had no such intention*.

(a) Purpose of the Act inconsistent with destruction of women's rights.

The purpose of enacting a program of veterans' insurance must have been largely to protect the dependents of veterans and to settle, at least as far as possible, the disturbing fears of tragedy that might leave the home without the support of the husband and father. Congress knew that wives of soldiers have always played an important part in the morale of the American army. Congress knew that wives of soldiers remaining at home have always made important and, in fact, invaluable contributions to the prosecution of the wars in which their husbands fought.

Counsel have sought to bring into this case the fact that the deceased, Major Leonard O. Wissner, was seeking to get rid of his wife, Margaret. There is no evidence to show that his wife *knew* that Major Wissner was purchasing bonds for one Naomi Beiler with community funds or that he was sending similar funds to his parents for a like purpose but that situation appears in the opinion of Justice Adams at pages 19, 20, and 21 of the record. At page 21 Justice Adams states that the transfers made to the defendants, the appellants in this action, by Major Wissner "were made in order to prevent his wife from receiving them and to force her into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded". (The evidence amply supported this statement.)

It seems hardly likely that Congress, having in mind the important role played by wives of soldiers

in wartime, would have intended to provide means whereby a soldier husband could enter into a secret arrangement with his government which would result in defrauding the wife of community funds which she might use for her own support and for the support of children of the family if necessary.

In other words, it is our position that since such a provision would permit a soldier with the aid of the government to secretly defraud the wife of her property by giving it to some volunteer, it is difficult to believe that Congress intended the construction espoused by counsel for appellants.

(b) Congress had ample opportunity to add a specific provision destroying the wife's rights and did not do so.

Section 454 and Section 454a of Title 38, U.S.C.A. have been the object of constant congressional amendment, repeal and re-enactment. The most significant change came in 1935 after the Supreme Court of the United States had decided *Pagel v. Pagel*, 291 U. S. 473 (78 L. Ed. 921), holding that proceeds of a war risk life insurance policy while exempt from the claims of creditors when paid directly to the beneficiary were not so exempt when paid to a third person as administrator or executor of a deceased soldier.

From the excellent discussion found in *In re McCormick's Estate*, 8 N.Y.S. (2d) 181, it appears that Congress acted to cure the holding in the *Pagel* case.

Since 1930, after the decision of *Robinson v. U. S.*, both federal and state Courts have been consistently holding that state laws governing community prop-

erty are applicable to the proceeds of these government life insurance policies when the spouses in question resided in a community property state. Since 1935, state Courts have been holding that a wife to whom alimony was due and payable was not a creditor within the meaning of the section and that the exemptions contained in Section 454 and its successor Section 454a did not operate to bar her claim against the proceeds of war risk life insurance policies.

With these two lines of decisions on the books, it appears that in 1935 Congress repealed Section 454 and passed Section 454a to remedy one specific situation; namely, to make the proceeds exempt from the claims of creditors after they reach the veteran's estate. How can it be contended then that Congress with these decisions firmly established intended to foreclose the operation of state property law upon the proceeds of government life insurance policies sold to servicemen during World Wars I and II. The argument is even more compelling when the court considers that in 1940, when Congress set out to prepare the nation for what appeared to be an oncoming war, that a new National Service Life Insurance Act was passed, along the lines of the Life Insurance Act used in World War I but with certain significant changes. Nowhere did they attempt to broaden the exemption of the proceeds of these new life insurance policies, but they were merely content to make the National Service Life Insurance Act subject to Section 454a of Title 38.

The destruction of the right of wives to protect their vested interests is a much more serious step than the exemption against claims of creditors. The latter was accomplished by specific language. If the former had been intended, we believe specific language would have been used.

We might digress at this point to say that counsel for appellants seem to feel that the soldier suffers some loss or injury by reason of the fact he cannot give away his wife's vested interest in the proceeds of a veteran's insurance policy. It is difficult to understand this reasoning, particularly in this case, where it appears from the record (Tr. p. 20) that the appellee worked as a trained nurse long after her marriage to the deceased, Leonard O. Wissner, earning the money to permit him to complete his education. It was her efforts that made it possible for him to earn the pay of a major in the medical corps. She had not only a legal claim to one-half the insurance because it was her vested property under the laws of California, but she had the moral right to it because her efforts had contributed so largely to her husband's success.

The husband could freely give his half of the community property as an unexpected gift to his parents. Such a gift amounted to a windfall so far as they were concerned. The insurance program of the United States Government scarcely required that the husband be aided in giving away the other half of the community property which belonged to his wife.

IX.

IF SECTION 454a IS CONSTRUED TO DEFEAT A WIFE'S VESTED RIGHT IN COMMUNITY PROPERTY, IT IS IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As we have already pointed out in this brief, the interest of the appellee in her husband's earnings was a vested interest arising from the contract of marriage entered into in California and the community property laws of the State of California as they affected that contract of marriage.

If Section 454a is construed in accordance with the contentions of the appellants there can be no question but that the property of the wife, Margaret V. Wissner, will be taken. *Lynch v. United States:*

> "Contracts between individuals or corporations are impaired within the meaning of the constitution whenever the right to enforce them by legal process is taken away or materially lessened". *Lynch v. United States*, supra, at page 580, head note 3rd.

This is true even though the property affected was not in possession at the time of the passage of the legislation. *Worthen Co. v. Thomas*, 292 U.S 426 at 431-432. In this case the Supreme Court of the United States, Chief Justice Hughes delivering the opinion in a creditor's suit, held that an Arkansas statute creating an exemption as to the proceeds of insurance impaired the obligation of contracts contrary to the constitutional provision.

In his opinion Chief Justice Hughes cited the case of *Sturges v. Kronenfield*, 4 Wheat. 122, 198, 4 L.Ed.

529, 549, and quoted the language of Chief Justice Marshall therein as follows:

> "It is not true that the parties have in view only the property in possession when the contract is formed or that its obligation does not extend to future acquisitions. Industry, talents, and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation."

Chief Justice Hughes then says:

> "This principle was applied to an exemption of insurance moneys in relation to antecedent debts in Bank of Minden v. Clement, 256 U. S. 126, 65 L.Ed. 857."

In other words, the opinion in the *Worthen* case says in effect that when Margaret and Leonard Wissner were married in California under the provisions of California community property law, the benefit of the industry, talents and integrity of each, looking to the future, was an important incident of that contract and any legislation that impaired the rights of either as to future acquisitions would impair the obligation of the contract.

Justice Brandeis, in *Lynch v. United States*, supra, in accordance with the quotation above cited, pointed out that whenever the right of a person to enforce a contract between individuals or corporations by legal process is taken away or materially lessened, the contract is impaired.

Likewise, in the case of *Lynch v. United States*, supra, it was held that the so-called economy act passed by the Congress of the United States detracting from the rights of a soldier under his agreement with the United States for insurance, was violative of the Fifth Amendment and therefore unconstitutional.

This holding in the *Lynch* case is a sufficient answer to the contention of counsel for appellants that the limitations of the Fifth Amendment do not apply to the statutes creating veterans' insurance and strongly supports the decision of Justice Adams when she says that if Section 454a is construed as appellants contend, it would be violative of the 5th Amendment to the constitution.

The contract between Margaret Wissner and her husband Leonard existed at the time he entered the army. She was, by that contract, entitled to a vested half of all of his earnings or the proceeds thereof. If Congress, by the words

> "benefits shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary"

meant to destroy the right of the appellee to enforce her property interest as against the beneficiary who admittedly is holding property belonging to her, then it becomes plain in the light of the two decisions last above referred to that Congress was depriving her of her property without due process of law.

It is true that Chief Justice Hughes, in *Worthen Co. v. Thomas*, supra, recognized the fact that in dire emergency or pressing public disaster, the state might temporarily disregard the provisions of Article II, Section 10 of the federal constitution preventing the impairment of a contract, but he was careful to point out that any action of that kind must have a reasonable relation to the legitimate end and that it must be temporary, applicable only to the period of dire emergency or pressing disaster.

We do not believe that it can be successfully or logically argued that the destruction of the wife's community rights had any reasonable relation to the prosecution of the war and certainly, if the contention of appellants is sound and Congress had any such intention, it was not limited to the period of war. This of course becomes obvious from the fact we are now long past the war and appellants still seek to take the appellee's community property.

Justice Adams, in her opinion (R. 27) cited the case of *United States v. Cohen Grocery Company*, 255 U. S. 81, 65 L. Ed. 516, in which it was pointed out that a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth Amendment, which case cited others to the same effect. A recent case to the same effect is *U. S. v. John J. Fellin & Co.*, 334 U. S. 651, 92 L. Ed. 1632.

The opinion of the California Appellate Court holding that the language of 454a relied on by appellants

is violative of the Fifth Amendment if it is construed to mean that the California wife is thereby deprived of her right to utilize the courts in obtaining the community property that actually belongs to her from the beneficiary who holds it, covers this situation fully and clearly.

We would be presumptuous to assume that we can add anything to the treatment of this matter found in the Appellate Court's opinion and approved by the Supreme Court of this state. We trust, therefore, that it is unnecessary for us to set forth in our brief a repetition of the reasoning, citations, and holding in Justice Adams' opinion since the same appears on pages 24 to 28 of the transcript of record in this matter. We respectfully refer this Court to the pages of the transcript above mentioned for any additional discussion of the particular point here under consideration.

X.

SECTION 454a SHOULD, IF POSSIBLE, BE CONSTRUED SO THAT IT WILL BE CONSTITUTIONAL.

It is a well established rule of constitutional law that courts construing a legislative act will, if possible, apply the construction that will render the act constitutional rather than unconstitutional. *Blodgett v. Holden*, 275 U. S. 142, 72 L. Ed. 206 (opinion by Mr. Justice Holmes).

> "Although research has shown and practice has established the futility of the charge that it

was a usurpation when this court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. United States v. Delaware & Hudson Co. 213 U. S. 366, 407, 408; United States v. Standard Brewery, 251 U. S. 210, 220; Texas v. Eastern Texas R. R. Co., 258 U. S. 204, 217; Bratton v. Chandler, 260 U. S. 110, 114; Panama R. R. Co. v. Johnson, 264 U. S. 375, 390."

The same principle of statutory construction was most aptly and clearly stated by Chief Justice Hughes in the case of *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182 where in considering whether or not a state law was in conflict with federal powers, he said:

"*if the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power* * * *

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. *In other words, such intent is not to be implied unless the act of Congress, fairly*

interpreted, is in actual conflict with the law of the state." (Emphasis ours.)

It seems to us that this language of Justice Hughes is peculiarly applicable to the case before the court at the present time and that it might be paraphrased as follows:

> "If the purpose of the veterans insurance act cannot otherwise be accomplished, if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect, except by construing Section 454a to destroy the right of a California wife to the aid of the state courts in protecting and obtaining vested property rights as against a citizen of that state, then that portion of Section 454a must yield to the provisions of the Fifth Amendment of the United States Constitution."

The intent of Congress to pass an enactment in violation of the Fifth Amendment to the United States Constitution is not to be implied unless the Constitutional Act, fairly interpreted, actually deprives the California wife of her vested property.

We have said before in this brief and we say again that the purpose of constitutional acts creating veterans insurance can be wholly and completely accomplished without giving to Section 454a the drastic interpretation contended for by appellants. We sincerely assert that Section 454a is not in actual conflict with the Fifth Amendment to the Constitution of the United States or the laws of the State of California if fairly interpreted and we respectfully contend that the interpretation of said section in support

of the decision of the Appellate and Supreme Courts of California will not in any way prevent the accomplishment of the purpose of the Veterans Insurance Acts passed by the United States Congress. It will not frustrate the operation of said Acts in the field to which they apply and the provisions thereof will not be refused their natural effect.

It is hardly necessary for us to say the conclusion we arrive at is that *first*, there is nothing to indicate an intent on the part of Congress to destroy the right of wives in community property states to enforce their vested property interests against private individuals; *second*, the statute in question must, if possible, be so construed that it does not violate the Fifth Amendment to the United States Constitution by depriving persons of their property without due process of law, and *last*, that if Section 454a in the judgment of this Court cannot be construed otherwise than contended for by appellants, it is clearly violative of the Fifth Amendment and must to that extent, fall as unconstitutional.

Dated, Modesto, California,
November 21, 1949.

Respectfully submitted,
CLEARY AND ZEFF,
E. DEAN PRICE,
By LESLIE A. CLEARY,
Counsel for Appellee.

(Appendix Follows.)

Coming now to the question of the insurance policy the first question presented is: "has this Court jurisdiction to determine the property rights in this policy?" The object of the law providing that suits may be brought in the Federal Court was for the protection of the Veterans Bureau and the Government, it was to protect the United States Government from having to litigate in all the different state courts of the United States. In other words it has the application only where the United States was a party to the suit. This is demonstrated by the case of United States v. Pfitsch, 256 U.S. 547, wherein it is stated: "Furthermore it is significant that this is not the only occasion upon which Congress has provided for *suits against the United States exclusively in the District Courts, etc.*" This is not a suit against the United States. The Court therefore determines that it has jurisdiction of this suit which is between citizens of this state concerning the establishment of a trust in the proceeds of a war risk insurance policy. The United States can be forced to do only what it has agreed to do in the policy and it has agreed to pay the money to the named beneficiaries. However, regardless of the fact that the United States can stand on its rights as expressed in the policy it does not have the right to say to the wife of a deceased veteran that regardless of the fact that the premiums were paid with community property that she shall not be entitled to insist that she receive a half of the

proceeds of the policy on the death of her husband. This she does not get by reason of being designated as a beneficiary but by reason of the fact that the policy is purchased with community money. The policy is not a gratuity, Lynch v. U. S., 292 U. S. 570. Although the insurance contract was not entered into by the U. S. for gain it nevertheless charges for the same—the soldier is simply permitted to buy insurance for a rate much less than that charged by private companies. Nor does this Court consider the field in which it might be said what a soldier can buy with his money and to whom the purchased article would belong as a field which the Federal Government is entitled to occupy exclusively. The object of the insurance is primarily the protection of the soldier and his dependents and certainly the wife of the soldier falls within this classification. The earnings of a married soldier are, under the laws of the State of California, community property. If they are used to buy a war risk insurance policy for a reduced rate—the policy is community property —and to permit the soldier to give the proceeds away, in the case of his death, to the exclusion of his wife, would permit him to make a gift of the wife's half of the community property. Coming now to the question of whether or not the designation of the mother of the veteran as being entitled to one-half of the policy constituted a gift to her, we find that she testified that she did not expect to be paid for the services to her son, but that she expected something from the daughter-in-law and that she ren-

dered the services because of the love and affection she bore her son. This would not indicate that as stated in the case of Crane v. Derrick, 157 Cal. 667, the circumstances were such that it warranted the inference that it was the expectation of both parties that compensation should be made. Such a situation as results from the defendant's testimony would negative the idea that the services should be considered a valuable consideration for the making of Nettie Cannell the beneficiary of one-half of the insurance policy. On the 8th of August, 1944, when the last change of beneficiaries was made there was very little indebtedness owed by the veteran to Nettie Cannell, so this could not be held to be a valuable consideration. In this connection it may be pointed out that as a beneficiary of the insurance policy she would receive money that would not be community property of herself and husband. The veteran was entitled to give away one-half of the benefits of the policy. He attempted to give it all away—one-half to his daughter and one-half to the defendant. This he was not permitted to do. If all of the facts and parties were properly before this Court which would entitle it to make a decision on the question of the life insurance and who was entitled to it the Court would hold that the plaintiff was entitled to one-half of the policy, the defendant to one-fourth of the policy and the veteran's daughter to one-fourth of the policy. This decision would be arrived at by reasoning that when the soldier designated the daughter as entitled to one-half and the defendant as entitled to one-half he gave

away wrongfully the one-half of interest of the wife —and that since she was entitled to a one-half the interest of each of the other parties would have to be reduced to a fourth. The Court feels that when beneficiaries of a policy are changed the mere fact that one was a beneficiary before the change and was again a beneficiary after the change would not give him any more rights than if he had not been mentioned in the first place. The decision above-mentioned which the Court would make if all parties and facts were properly before it the Court would carry out by designating the recipients of the insurance money as trustees for the plaintiff to the extent that they should pay over to her of what they received that proportion which would give her a one-half of the insurance money.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

HEARING DENIED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEE'S REPLY TO AMICUS CURIAE BRIEF FILED BY THE UNITED STATES SOLICITOR GENERAL.

LESLIE N. CLEARY,
WM. ZEFF,
E. DEAN PRICE,
1209 H Street,
Modesto, California,
Attorneys for Appellee.

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I

Introduction

The Solicitor General of the United States has been courteous enough to furnish us with a partially completed

typewritten copy of the brief which he proposes to file in this matter.

Following receipt of this partially completed typewritten copy there is of course no time to prepare a complete reply and certainly no time to have a reply printed.

It may be that the rules of the United States Supreme Court will not permit us to file this very brief reply in typewritten form but in any event we submit herewtih a summary reply to the contentions made in the Solicitor General's amicus curiae brief as it has been submitted to us.

II

Comments on Statements and Contentions Found in the Amicus Curiae Brief of the Solicitor General

(a) At page 10 we find the following statement: "Neither Appellee nor the Court below questions that designation (of beneficiary) nor disputes the fact that the beneficiary so designated was the one intended by the insured to receive the proceeds." This statement is only half true. Neither the Appellee nor the Court below questions the *designation* of the mother as beneficiary. We do not concede, however, that the beneficiary so designated was the one intended by the insured to receive the proceeds. The Record in this case (R. 19-21) discloses that the deceased had sent his community earnings to a bank for the purpose of purchasing bonds for one Naomi Beiler and that he sent a considerable sum of money, approximately $3,000.00, to his parents asking that they use the money, with the exception of $500.00, for the same purpose. As Justice Adams comments (R. 21), the evidence indicated that the deceased was attempting to "further plans which decedent was making for his future from which she (the wife) was to be excluded". The Appellee has no knowledge of the arrangement between the deceased and his parents concerning the

final disposition of the proceeds of the insurance after they reach the hands of the parents but in view of the provisions made by him for Naomi Beiler, it is improper for the Solicitor General to say that the Appellee does not dispute the fact that the beneficiary designated was the one intended by the insured to receive the proceeds unless it is intended that this statement contemplate only the temporary receipt of the proceeds and not the ultimate use thereof.

This very situation points up our contention that the construction of the act contended for by the Solicitor General would permit the soldier, by a secret agreement with his government and by secret arrangements with the beneficiary named, to defraud his wife of property by diverting the proceeds of the insurance to some other woman in whom he may have become interested to the exclusion of his wife. The dislocations of family life resulting from war make such possibilities quite imminent and, conservatively speaking, we feel it is doubtful that Congress would intend to foster such a result.

(b) At page 32 of the typewritten copy of the Solicitor General's brief, we find a footnote containing this statement: "Equally lacking in merit is the assumption made by the Court below that the premiums on the N. S. L. I. policy in this case were paid from community funds (R. 21)".

We feel that the Solicitor General neglected to observe the fact that the complaint in this case alleged that the premimums on the policy were paid with the earnings of the deceased *and that the earnings were the community property of himself and his wife*, (R. 3, para. 2) and that this allegation of the complaint was not denied by the answer.

As the matter now comes before Your Honors, it would appear to be an admitted fact, contrary to the Solicitor General's statement, that the funds used in the purchase of the N. S. L. I. policy in question were community funds.

The Solicitor General even contends that under California law a soldier's pay is not community property. He goes back almost to the days of '49, certainly to the time of the Civil War, for a case in support of this contention—*Packard* v. *Arrelanes*, 17 Cal. 525, 531, and completely ignores the subsequent amendments to the California community property laws and the decision of the Supreme Court of California in *French* v. *French*, 17 Cal. (2d) 775 at 777, 112 Pac. (2d) 235.

The Solicitor General also ignores the fact that in the very case which he cites, namely, *Packard* v. *Arrelanes*, the Spanish law which he claims to be the basis of the California community property statute is quoted at page 532 as follows:

> "If he (the husband) be in the army without pay, at the expense of himself and his wife, whatever he may earn in this way (we assume this probably means by pillage or some similar method) be it all the husband's and wife's; for even as the cost is common to both let what they may earn in that way be common to both. What above is said of the earnings of husband's, let the same be as regards those of wife's."

For further support of his contention, the Solicitor General cites the Superior Court decision of *Johnson* v. *Shelton* in which a Superior Court Judge overruled his associates on the Superior Court bench in Los Angeles, overruled the Appellate Court of the State of California in its decision in the instant case, and was in turn overruled three weeks later by the Supreme Court of California denying a hearing in this case.

(c) At page 31 of the typewritten copy of the Solicitor General's brief, he argues that the opinion of the Appellate Court in the instant case "be contrasted with the recent opinion of another California District Court of Appeals

in *Kauffman* v. *Kauffman*, 93 ACA 966 at 972", and sets forth a quotation from that decision. The Solicitor General neglects, however, to point out that the Court in the *Kauffman* case, at page 972 said

> "We are not dealing with such a situation as was presented in Wissner vs. Wissner, 89 Cal. App. (2) 759, 201 Pac. (2d) 837. In that case the widow of the insured claimed a right to one-half of the proceeds of a national service insurance policy as against the named beneficiaries on the basis that all of the insurance premiums were paid with community earnings or funds. It was there held that the wife had a vested interest under the community property laws of this state and that she was therefore entitled to one-half of the proceeds of the policy.
>
> "In the instant case the record is silent as to the source of the premium payments. Such payments may have been made entirely from separate funds of the insured to and including the date of the property settlement agreement and thereafter from community funds of the insured and defendant herein . . . ."

At the same page the Solicitor General says "no federal court nor any state court heretofore has cast any doubts on the act's constitutionality". The fact is that the question involved in this case has, so far as we can determine, never been before a Court wherein the opinions are published. We believe the Solicitor General has in mind such cases as *Barton* v. *United States*, 75 Fed. Sep. 703, relied on by him at page 20 of typewritten brief under his heading II; *Pack* v. *United States*, 176 U. S. Fed. (2) 770, referred to by him on page 18 of his typewritten brief under subdivision (b) of his section numbered I; and *James* v. *United States*, No. 6061-B. H.; S. D. Calif., cited at page 33 of his typewritten brief under subdivision (c) of his section numbered III.

As we have previously pointed out in briefs on file in this Court, none of these cases considered the constitutionality of the act in question if it was construed to deprive a California wife of her right to enforce her community property interest against the beneficiary who had received the proceeds. *Barton* v. *United States* contained dictum on the question but it was not essential to the decision. *James* v. *United States* was not in point because it involved Texas law which requires that the wife show fraud, and *Pack* v. *United States* specifically refused to determine whether or not a wife in California could impress the proceeds in the hands of the beneficiary with a trust in her favor. As the Solicitor General concedes, the dictum in the *Pack* case lends support to the conclusion reached by the California Appellate Court in this case.

In other words, these three cases, like the *Kauffman* case and others that have considered allied matters, do not by any stretch of the imagination directly determine the question of whether or not the destruction of the wife's right to protect her community property interest is or would be a violation of the Fifth Amendment to the Constitution.

(d) At page 19 of the Solicitor General's typewritten brief, at the very end of his section numbered I, he makes this statement:

> "And this Court has completely dispelled any doubt that the 'scope, nature, legal incidents and consequences' of this relation, as well as any interferences therewith, raise federal questions governed only by federal law free from modification by state law . . ."

He cites in support of this statement *United States* v. *Standard Oil of California*, 332 U. S. 301, and in his footnote quotes from that case.

We desire to direct the Court's attention to the fact that the quotation set forth by the Solicitor General in the foot-

note of his page 19 shows that *the Supreme Court recognized the fact that relations between soldiers and persons outside the armed forces or nonfederal governmental agencies are not subject to the same rule.* The Court reserved discussion of this question by saying "*to whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies* the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority."

In the instant case we are not concerned with the relations between the soldier and his government nor the relations between the soldier and the Veterans Bureau. The relation that is involved is the relationship between the soldier and his wife. The question of whether or not the wife could request the United States government or the Veterans Bureau to do or refrain from doing any act is not involved. The question of whether or not the United States is required to pay any particular sum to any particular person is not involved. Here we have to do only with the situation after the United States government, through the Veterans Bureau, has paid an amount admittedly due and has finished every duty required of it under its contract with the soldier. *The judgment does not purport to give the wife a right to receive any specific amount but only accords her her community interest in such amounts as may be paid by the United States government under whatever liability it admits it has in accordance with its contract.*

We believe the reservation which we have mentioned, found in the decision in *United States* v. *Standard Oil Company of California*, shows that it is not authority for the Solicitor General's position in this matter.

(e) At page 22 of the typewritten copy of the Solicitor General's brief, under his section numbered II, subdivision

(b), he quotes section 602 (i) of the N. S. L. I. Act to the effect that "no person shall have a vested right to any installment or installments of any such insurance . . ." and throughout the brief the Solicitor General contends that this is exactly what is meant, yet in the case of *Lynch* v. *United States*, 292 U. S. 571, 78 L. Ed. 1438, this Court held that the soldier did have a vested right to installments of disability payments and that the efforts of Congress to detract from that right in the socalled "economy act" would be violative of the Fifth Amendment.

(f) At page 28 of the typewritten copy of the Solicitor General's brief, under his section numbered III, subdivision (b), in a footnote, there is an attempt to distinguish cases such as *Gaskins* v. *Security First National Bank*, 30 Cal. App. (2nd) 409 and the Solicitor General indicates that he disagrees with these decisions. There is no indication, however, as to why the Solicitor General has never seen fit to appear in Court and oppose decisions of this character protecting the wife's right to use Court process in obtaining the proceeds of a veterans insurance policy. Neither is there any explanation of the silence of the Veterans Bureau on this point or the silence of Congress on this point when, in 1940, this whole matter was under consideration by Congress and the National Service Life Insurance Act was passed and merely made subject to Section 454(a) of Title 38 without any further consideration of the exemption questioned.

We believe it to be impossible for the Solicitor General, or anyone else, to reconcile the many decisions similar to *Gaskins* v. *Security First National Bank*, *supra*, which decisions are cited at page 33 *et seq.* of our brief, with the contention of the Solicitor General that the proceeds of insurance in the hands of a stranger should not be subject to process of Courts for protection of the wife's community property rights.

Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U. S. 140, is cited in support of the Solicitor General's contention that the due process clause does not prohibit the United States "from annulling private rights even if they exist and have actually vested, so long as the action taken falls within some paramount federal power" (P. 28 of typewritten brief, subsection (b) under section numbered III).

Unless we misread this case, it is not authority for this contention. We understood the decision in that case to hold that the United States *is subject to the Fifth Amendment even when acting under the war power*. The Court pointed out that the act in question did not completely destroy property rights but that it gave those who possessed the property rights seven months in which to dispose of their liquors.

We think there is a good analogy between that decision and the present case. We concede for the purpose of this argument that the United States can limit the wife's protection of her property rights by preventing her from compelling the United States to make any payments to her providing they allow her the limited right to protect her interests when the funds are in the hands of the beneficiary. It is true that this limitation may amount to a destruction because the beneficiary may be unable to respond to the Court process. This would be a situation comparable to that involved in *Hamilton v. Kentucky Distilleries etc., supra*, where those owning liquor were given seven months in which to dispose of it. If they were unable to dispose of the liquor in seven months, their property rights were lost and the limitation would, to that extent, amount to a destruction but the Supreme Court said this is not taking property without due process. Likewise, we will assume, for the purpose of this argument, that the Court would say that the limitation of the wife's rights to action against a person other than the United States in whose hands she found her

property may not be taking her property without due process.

(g) On page 29 of his typewritten brief, under subsection (b), section numbered III, the Solicitor General says "where Congress in the exercise of an admittedly granted power *has adopted a means reasonably adapted to achieve a legitimate end*, such legislation has withstood constitutional challenge . . ." (Emphasis ours.)

The Solicitor General does not, however, present any argument to indicate that the destruction of the wife's right to protect her community property interest in the state Courts was a means reasonably adapted to achieve the legitimate ends on which he upholds the constitutionality of the construction of the act which he contends for. At page 12 of the typewritten copy of his brief, under his subsection (a), section numbered I, the Solicitor General sets forth four powers of Congress as encompassing the legitimate ends in question, namely,

"a. To . . . provide for the common defense and general welfare of the United States.

b. To declare war . . .

c. To raise and support armies. . . .

d. To provide and maintain a navy. . . .

e. To provide for calling forth the militia. . . ."

It seems to us that the argument set forth in the Solicitor General's brief would be more persuasive if in some manner he could demonstrate to this court that the destruction of Margaret Wissner's right to protect her community interest in the Courts of California was a means reasonably adapted to achieve one of the legitimate ends which he sets forth.

(h) The Solicitor General, in his typewritten appendix (b) sets forth correspondence and letters which are not a

part of the evidence in this case and we doubt that such evidentuary matter is properly introduced at this time. We have requested the Solicitor General to delete this matter from his proposed brief but inasmuch as it may not be deleted, we desire to make the following comment.

Appendix B and comment thereon in other portions of the brief, are directed toward the contention that administrative construction of the N.S.L.I. Act should be given great weight. In this case we bowed to the administrative construction to the effect that the United States would not deliver directly to Margaret Wissner her share of any proceeds which the Veterans Bureau admitted it was liable to pay and we sought our remedy in what we believed to be an appropriate form.

We do not believe, however, that administrative construction extending the provisions of the act to destroy the widow's rights to the assistance of her state Courts after the proceeds have left the hands of the Veterans Bureau should control this Court in determining whether or not there was any such intent on the part of Congress and if there was such an intent, whether or not it was constitutional.

The Solicitor General points out the fact that if our contention is sustained, the widow's rights will be different in different states. We do not conceive this to be a seriously important argument. Every state has its own method of protecting the marital rights of women. The method adopted by the community property states is different from that adopted in states such as New Hampshire, as demonstrated by the case of *Ibey* v. *Ibey*, 93 N. H. 434, 43 Atl. (2d) 157, referred to at page 30 of our brief, but the purpose of the laws of the various states concerning a wife's interest in accumulations during marriage is basically the same, namely, to give some protection to her. These varying forms of protection under the decision of

the California Appellate Court in the instant case will in no wise affect the Veterans Bureau or the United States. The wife will be protected according to the state laws fixing the property interests of their respective citizens and it seems to us this is a proper result to look forward to.

At page 29 of the typewritten copy of the Solicitor General's brief under subsection (b) of the section numbered III, the Solicitor General cites the case of *Ruddy* v. *Rossi*, 248 U. S. 104, having to do with the exemption of homesteaded lands from "any debt or debts" and gains some comfort from the decision in that case holding that the homesteaded land was not subject to the creditor's claims which had been asserted. The Solicitor General does not, however, make the contention that this Court would have held that the California wife who, after marriage, aided her husband in proving up a homestead, using community funds therefor, would have no right to the protection of the California Courts in asserting her community interest. We doubt that the Solicitor General would make such a contention and certainly we doubt that if it was made it would be sustained. The latter situation, however, is analogous to the one now presented to this court.

(i) The Solicitor General devotes a considerable portion of his brief to the contention that the rights and obligations under a contract between the United States and others must be answered in the light of federal rather than state law. We do not doubt this contention but it is our belief that it has no particular bearing on the question before the Court. If the United States enters into contracts as it would with a ship builder, airplane manufacturer, and others in California, we are not contending that the rights and obligations of the United States and the ship builder or the airplane manufacturer would be determined by state law. We contend, however, that after the United States

paid compensation to the ship builder or the airplane manufacturer in California, that compensation would become community property of himself and his wife if they were both residents of California during the operation and we contend further that if the United States government sought to take away the wife's right to protect her interest in that compensation, it would be violative of the Fifth Amendment of the Constitution even though the contracts involved were war contracts and were made under the authority of the provisions of the United States Constitution set forth on page 12 of the typewritten copy of the Solicitor General's brief which we have above referred to.

We think the same principal applies to the particular war contract under consideration in this case and that after the proceeds of the soldier's investment in insurance are paid by the United States, the wife certainly should not be prevented from resorting to the state Courts for protection.

(j) At page 32 of the typewritten copy of the Solicitor General's brief, under subdivision (c) of III, he quotes with approval language found in the Superior Court decision of *Johnson* v. *Shelton* to this effect:

> "In one aspect such pay (soldier's pay) represents a gift by the government rather than earnings because the government can compel any person to serve in its armed services without pay. *United States* v. *Williams*, 322 U. S. 46".

If the Solicitor General is impressed with the reasoning of the Superior Judge in that case, it would be entirely logical for him to intercede in behalf of Naomi Beiler to protect her right to the bonds which Major Wissner's parents were supposed to purchase for her with community funds. The funds in question were the earnings of the

soldier and under the language of *Johnson* v. *Shelton* approved by the Solicitor General, these earnings were a gift and Naomi Beiler should be entitled to her bonds. The soldier wanted it that way and perhaps if the reasoning of the Solicitor General in appearing against the widow in this case were carried to the ultimate conclusion, it would be proper for him to take up the cudgel in behalf of Naomi Beiler and against the parents of the deceased soldier who, up to the time of the trial of the action, had failed to respect his wishes by purchasing the bonds for her.

We think perhaps the language of *Johnson* v. *Shelton* to the effect that the soldier's earnings are a gift from the government is a little far fetched. Reasoning from the same premise, we might say that the earnings of everybody in wartime are a gift from the government because the government could draft all of us into universal service and require that we serve without pay therefor; since we are permitted to continue our homely pursuits, whatever we make is a gift from the government and our wives can have no interest therein.

On this point and also in connection with the statement of appellants' counsel that the soldier husband could freely gamble the community property, the holding of the California Supreme Court in *Estate of Gold*, 170 Cal. 621 is most interesting. In this case the deceased husband Gold was in partnership with one Sullivan in conducting an illegal gambling business. Gold died and Sullivan, being an honest gambler, paid over to Gold's estate the agreed share of the latter in the profits of the gambling enterprise. The widow of Gold brought a proceeding against the estate to determine heirship, claiming that the profits derived from the gambling venture were community property and that she was entitled to them. The administrator contended

that the profits from the gambling paid to the estate by Sullivan were a gift because Sullivan could not be compelled to make the payment since the gambling enterprise was illegal. The Supreme Court of California said:

> "When Sullivan needed money with which to gamble, he would take it from the bank and when the games were concluded, he would deposit to the partnership account his gains therefrom. Whether he was under obligation to do this or not, the fact remains that he did so. There was no intent by Sullivan to make a gift to Gold. There was an agreement by him to pay half the profits to Gold, an agreement which he recognized as binding and which he faithfully carried out, whether legally good or not. He paid Gold this part of his gambling profits in return for the services of Gold in running the saloon, and thus attracting thereto the class of persons likely to engage in the games Sullivan was carrying on. There was a consideration rendered by Gold. The part of the profits turned over to him was not a gift. It was property acquired by the husband during marriage otherwise than by gift, bequest, devise, or descent, and therefore, under section 163 of the Civil Code, it is not his separate property, but, under section 164, it is community property of the marriage. The plaintiffs, therefore, cannot rightfully complain of the action of the court in holding property so acquired to be community property."

In the instant case, the husband invested the community funds in the insurance policy. It may be that the wife could not enforce any claim against the United States but since the United States, like Sullivan, was honest, recognized its obligation, and paid the proceeds contracted for by the soldier, the wife's community property interest attached to those proceeds; they are community property and she is entitled to recover her interest.

III

Conclusion

We frankly admit that it is quite impossible for us to present a reply to the Solicitor General's brief that satisfies us because the extremely limited time will not permit. We believe, however, that the Solicitor General continually fails to recognize the fact that the decision of the California Courts does not affect "the distribution of N.S.L.I. proceeds" by the Veterans Administration but that it leaves that situation exactly as it has been. The government, through the Veterans Administration, can still distribute the proceeds exactly as the contract in question provides. As we have previously indicated, it is very difficult for us to understand why the Veterans Administration and the Solicitor General make war against the war wife or the war widow. We earnestly believe that straight and unbiased thinking on the part of the Veterans Administration and the Solicitor General would lead to the conclusion that they should not enter a contest of this character against the widow. They have never sought to interfere to prevent the protection of the wife in her claims against the proceeds of veterans insurance in the hands of the veteran. Their lack of activity in connection with that matter seems hardly reconcilable with their zeal in joining a stranger who made no contribution to the community as against the wife.

The Solicitor General, at one point in his argument, stated that there was nothing to indicate that Margaret Wissner was destitute or in need of this help or in need of her rightful share of the community property, taking the position that the cases which gave the wife the benefit of court process in obtaining her share of the proceeds from the veteran himself were cases where the wife's need or destitute condition was shown. These cases do not place her right on

any such basis. The wife's right to obtain her share of the proceeds in the veteran's hands is simply the right of the wife recognized in all states to a share or a fair measure of interest in the husband's earnings and in the property accumulated by him after marriage, having in mind the customary method of living and the amount of the earnings and accumulations.

We believe the same principals impelling the decisions of the courts on the subject of the wife's right to obtain her share of the proceeds in the veteran's hands lead to the conclusion that she should be permitted to obtain her community property rights through the State Courts as against strangers who possess community property.

Dated at Modesto, California, December 1, 1949.

Respectfully submitted,

CLEARY AND ZEFF,
E. DEAN PRICE,
By LESLIE A. CLEARY,
Counsel for Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
APPELLANTS

v.

MARGARET WISSNER

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted by the United States as amicus curiae in support of appellant's right to review, by this Court, of the decision of the District Court of Appeal, State of California, Third Appellate District, in the case at bar. As we read its opinion, the court below has ruled against the validity of a federal statute concerning veterans' benefits; or, at the least, it has decided an important question of federal law in a way that is untenable and conflicts with the interpretation which the Veterans Administration and the lower

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federal courts have placed upon the statute. The opinion of the court below (R. 70-84) is reported at 89 Adv. Cal. App. 857, 201 P. 2d 837. The California Supreme Court denied a hearing without opinion (R. 37), so that the decision of the District Court of Appeals is the decision of the highest state court in which review could be had.

The question in the case is whether benefits paid to a beneficiary of a National Service Life Insurance policy are subject to attachment, levy or seizure under legal or equitable process, at the instance of the widow of the insured claiming one-half of the benefits as her share of community property under state law, notwithstanding Section 3 of the Act of August 12, 1935, as amended (49 Stat. 609; 38 U. S. C. 454a). That section provides that: "Payments of benefits * * * to * * * a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." [1]

The insured in the instant case was Dr. Leonard O. Wissner, who at the time of his death in India was a major in the United States Army. Dr. Wissner took out a National Service Life Insurance policy, and pursuant to Section 602(g) of the

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[1] This provision was specifically made applicable to National Service Life Insurance by Section 616 of the National Service Life Insurance Act of Oct. 8, 1940, 54 Stat. 1014, 38 U.S.C. 816.

National Service Life Insurance Act (54 Stat. 1010, 38 U. S. C. § 802(g)), which authorizes an insured to designate one or more beneficiaries within certain classes, including the parents of the insured, designated his mother, Louise M. Wissner, the appellant herein, as principal beneficiary, and his father as contingent beneficiary. Pursuant to Section 608 (54 Stat. 1012, 38 U. S. C. 808), which empowers the Veterans Administration to administer the Act and to pay the benefits to the properly designated beneficiary, the Veterans Administration has been paying the appellant, Louise M. Wissner, the monthly sum of $76.70.[2] The appellee, widow of the insured, brought suit in the state court against the beneficiary for one-half of these insurance payments, claiming this amount as the widow's share of the community property under California law. Appellant defended on the ground that these benefits were immune from suit by virtue of Section 3 of the Act of August 12, 1935, as amended, *supra*, and the scheme of benefits under the National Service Life Insurance Act which it undoubtedly was designed to protect. But this defense has been rejected by the court below which affirmed a judgment for the appellee for one-half

[2] The Veterans Administration has pursued the consistent policy that benefits under the National Service Life Insurance Act, are protected by Section 3 of the Act of August 12, 1935, as amended, *supra*, and are the exclusive creature of federal law, and no person can claim any right or interest in such benefits, before or after payment to the beneficiary, except by virtue of the statutory scheme.

of the insurance benefits, holding that if Section 3 of the Act of 1935, as amended, were construed to prevent judgment for the appellee, the statute would be unconstitutional as a taking, without due process of law, of the widow's share of community property, vested in her by state law (R. 77-80). The court offered no possible interpretation of the statute which would preserve it from what it held to be its constitutional infirmities. We think it clear that the terms of the act squarely prohibit allowance of appellee's claim.

The case is thus one in which the validity of a statute of the United States has been drawn in question by the appellee, and the decision of the state court is against its validity. It is also one in which an immunity has been specially claimed by the appellant under a statute of the United States and the claimed immunity has been denied by the highest state court in which a decision could be had. The case is therefore one properly before this Court, either as an appeal under 28 U. S. C. 1257(1) or, at the very least, by certiorari under 1257(3).

The question in the case has not been decided by any other highest state court or by any federal court of appeals, but there are numerous lower court decisions, including decisions in the United States District Court in California, in conflict with the decision in this case. The question is one of great importance to the United States and to a numerous class of persons comprising, as it does, a

large portion of the possible beneficiaries of soldiers' insurance in community property states.

Although the United States was not a party to the proceedings in the state court, it has a definitive interest in this appeal. A decision by this Court will determine finally the extent of protection afforded beneficiaries under the federal National Service Life Insurance statute by Section 3 of the Act of August 12, 1935, *supra*. The fact that the form of this suit is one between the designated beneficiary and a claimant, to which the United States is not a party, does not alter the substance of its attack upon the Congressional scheme for National Service Life Insurance. The Veterans Administration has consistently refused to make payment directly to persons in the class of the appellee herein as against the designated beneficiaries, and it is therefore interested in preventing payment to such persons by indirection. (See *United States* v. *Snyder*, App. D. C. No. 9848, decided July 5, 1949.) Accordingly, because of the importance of the question presented, involving the interpretation and validity of a federal statute, we urge that probable jurisdiction of the appeal be noted or that a writ of certiorari be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1949.

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Brief for the United States as Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER and LEANDOUS H. WISSNER,
APPELLANTS

v.

MARGARET WISSNER

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The Superior Court of the State of California in and for the County of Stanislaus wrote no opinion. The opinion of the District Court of Appeal, Third Appellate District, State of California (R. 17-29), is reported at 89 Cal. App. 2d 759.

JURISDICTION

The judgment of the District Court of Appeal, Third Appellate District, was entered January 21, 1949 (R. 17). A petition for rehearing was denied

February 11, 1949 (R. 29). The Supreme Court of California denied a hearing on March 21, 1949 (R. 30). The District Court of Appeal, on May 16, 1949, allowed an appeal to this Court (R. 33). This Court noted probable jurisdiction on October 10, 1949 (R. 36). Jurisdiction of this Court rests upon 28 U. S. C. 1257(1).

QUESTIONS PRESENTED

1. Whether the community property laws of California can be effective to furnish a basis for a claim by a serviceman's widow for an amount equal to one-half of the proceeds of the serviceman's National Service Life Insurance policy in which he had designated his parents as beneficiaries.

2. If the first question is answered in the affirmative, whether the Act of August 12, 1935, which is incorporated by reference into the 1940 Act and which exempts veterans' insurance policy proceeds from all judicial process, violates the widow's constitutional rights if it is invoked by the parents so as to prevent her from satisfying a judgment on her claim directly out of the proceeds of the policy.

STATUTE INVOLVED

The pertinent provisions of the National Service Life Insurance Act of 1940, and of the Act of August 12, 1935,[1] which is incorporated by refer-

[1] The National Service Life Insurance Act of 1940 will be referred to as the "1940 Act" or the "N.S.L.I. Act." The Act of August 12, 1935, will be identified as the "1935 Act", even though, for all purposes here pertinent, it is incorporated by reference into the 1940 Act.

ence into the 1940 Act, are set forth in Appendix A, *infra*, pp. 55-60.

STATEMENT

The instant case involves an action brought by appellee, the widow of Major Leonard O. Wissner, against the Major's mother and father in order to recover one-half of the "paid and to be paid" proceeds of a National Service Life Insurance policy (hereinafter, "N.S.L.I. policy") in which the mother was named as the principal beneficiary and the father the contingent beneficiary.[2]

The pertinent facts may be summarized as follows:

Wissner married appellee in California in 1930 (R. 11). He entered the Army on November 9, 1942, and took out a $10,000 N.S.L.I. policy (R. 5, 13). Pursuant to Section 602(g) of the 1940 Act (Appendix A, *infra*, p. 55), which authorizes the insured to designate one or more beneficiaries within certain classes, he designated his mother, Louise M. Wissner, as principal beneficiary, and his father, Leandous H. Wissner, as contingent beneficiary (R. 13). The premiums for this policy were paid

[2] The parents have raised no question here concerning the widow's right to one-half of the value of an automobile and other personal property given to them by the deceased officer. See R. 2, 11-12. The issues before this Court relate only to the widow's claim to one-half of the proceeds of the National Service Life Insurance policy. As stated by the District Court of Appeal, an appeal to this Court was sought and allowed only with respect to that portion of its judgment "which affects the rights of the appellants [*i.e.*, the parents] to retain the proceeds of a National Service Life Insurance policy, paid and to be paid". (R. 33.)

by Major Wissner out of his Army pay and the policy was in full force and effect on November 14, 1945, when he died (R. 3, 8, 13).

Thereafter, the insured's mother, as designated principal beneficiary of the policy, filed her claim in the Veterans Administration for the benefits under the insurance contract. A community property claim to one-half of those benefits was also filed with the Veterans Administration on behalf of the widow. (Appendix B, *infra*, pp. 68-69). Upon consideration of these claims for the proceeds of the insured's policy, the Veterans Administration, in accordance with Section 608 of the 1940 Act (Appendix A, *infra*, p. 59), which authorizes the payment of insurance benefits to the properly designated beneficiary, rejected the widow's claim and directed that the payment of the entire proceeds be made to the insured's mother (R. 9; Appendix B, *infra*, pp. 70-71). The Veterans Administration has accordingly been paying the designated beneficiary the monthly sum of $76.70, commencing as of November 14, 1945 (R. 9).[3]

[3] This monthly payment will be made by the Veterans Administration to the insured's mother for the rest of her life. (These payments consider the fact that she was 65 years old at the time of the death of the insured and are also based on the American Experience Table of Mortality and a 3% interest rate, 38 C.F.R. (Cum. Supp.) sec. 10.3450(b)). If she should die before receiving 120 monthly payments, the balance of those payments would go to the contingent beneficiary designated by the insured. If both the principal and contingent beneficiaries die before the end of the ten-year period, the entire remainder of the 120 payments would, under the N.S.L.I. Act and the policy, be paid to appellee, the widow of the insured. Section 602 (h) (3); 38 C.F.R. (Cum. Supp.) sec. 10.3448(a).

Subsequent to the rejection of her claim by the Veterans Administration, the widow, on March 15, 1947, claiming the same community property right to one-half of the paid and future monthly payments made by the Veterans Administration under the policy, instituted this proceeding by filing a complaint in the Superior Court of California in and for the County of Stanislaus (R. 1, 4, 6-7). The complaint named the insured's mother and father as defendants (R. 1); it did not join the United States, the Veterans Administration, nor any other governmental agency or officer as defendant. The complaint alleged generally that the insured and appellee were husband and wife up until his death (R. 1); that the insured died while stationed with the Army in India on November 14, 1945, thus leaving the appellee as his surviving widow (R. 1, 5); that all of the property possessed by the insured at the time of his death was community property (R. 1); that the insured had taken out a $10,000 National Service Life Insurance policy (R. 3); that the policy was in full force and effect at the time of his death (R. 3); that the premiums on the policy were paid from out of the earnings of the insured and that these earnings were the community property of the insured and appellee (R. 3).

Further allegations in the complaint admitted the designation in the policy of the insured's mother as the principal beneficiary and of his father as contingent beneficiary (R. 3). However, the complaint included an averment that appellee "never

at any time had knowledge" that the insured had named anyone other than herself as beneficiary, and that she never consented to the use of community funds for the payment of premiums on a policy of insurance naming the mother and father as beneficiaries (R. 3-4). The complaint also alleged that the designated principal beneficiary has received "as proceeds of said policy the sum of $76.70 per month, commencing as of November 14, 1945" and that one-half of these proceeds, together with 7% interest thereon, was "received for the use and benefit of the plaintiff" (R. 4). The complaint then prayed for judgment for one-half of each of the $76.70 monthly payments received by the principal beneficiary from the Veterans Administration through September, 1947,[4] together with 7% interest from the date of receipt of each monthly payment (R. 4, 6, 9). As to future payments to be made to the designated beneficiary by the Veterans Administration, the complaint prayed that the court order the defendants "to pay and deliver to plaintiff herein one-half of all moneys hereafter received from the proceeds of the said insurance policy immediately upon the receipt thereof by the said defendants or either thereof" (R. 6-7).

On April 21, 1947, the insured's mother and father filed an answer alleging that the premiums

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[4] Although filed on March 15, 1947, the complaint was amended in the course of trial to ask for judgment for one-half of the payments made to the principal beneficiary by the Veterans Administration through September, 1947.

on the policy "were paid by deduction from the pay of the said Leonard O. Wissner as an officer in the United States Army" (R. 8); that, at all times, they were the designated beneficiaries of that policy (R. 8); and that "a soldier in the Army of the United States of America has the legal right to designate the beneficiary in any National Service Life Insurance policy issued on his life, and that the designation of the defendants herein as beneficiaries in said policy is final and conclusive as against any claimed rights of the plaintiff" (R. 9).

After the trial, the Superior Court of Stanislaus County made findings in accord with the allegations of the complaint (R. 13, 14). The court concluded that the widow was entitled to "½ of the entire proceeds of said insurance policy when and as the same are paid" to the designated beneficiary, and entered judgment in favor of the widow for one-half of all the monthly payments received by the mother from November 14, 1945, through September, 1947, together with 7% interest per annum on one-half of each monthly payment from the date of its payment to the mother, up to the date of the judgment, January 2, 1948 (R. 16). With respect to the monthly payments received for October, 1947, and thereafter, the judgment required the insured's mother and father to pay to the widow one-half of all such future monthly payments "immediately upon the receipt thereof by said defendants or either thereof" (R. 16). The judgment also allowed appellee 7% interest on one-half of any

future monthly payment not paid to her within 5 days after receipt of the payment by the designated beneficiary.

The District Court of Appeal, Third Appellate District, affirmed the lower court's judgment on January 21, 1949 (R. 17, 29). It held that the California law concerning policies issued by private insurance companies makes it clear that "where insurance on a husband's life was bought and paid for with community funds, the husband could give away no more than one-half of the proceeds without the written consent of the wife" (R. 21). Reasoning that a failure to apply the same rule to the proceeds of a N.S.L.I. policy would contravene the Fifth Amendment by divesting plaintiff of her vested community property rights, the court announced its refusal to be bound by the provisions of the federal statute under which the policy here involved was issued (R. 23, 25, 28). A petition for rehearing was denied by the court on February 11, 1949 (R. 29). The Supreme Court of California also denied a hearing, with Judge Schauer dissenting (R. 30).

INTEREST OF THE UNITED STATES

The critical interest of the United States in the instant case is twofold. First, it is concerned with the holding of the court below that the 1935 Act (*infra*, pp. 44-45, 60), exempting benefits paid or payable to beneficiaries from "attachment, levy, or seizure by or under any legal or equitable process

whatever", is unconstitutional. That statute is incorporated in the 1940 Act (Section 616, Appendix A, *infra*, pp. 59-60) and forms part of the terms of the insurance policy here involved. *United States* v. *Zazove*, 334 U. S. 602; *White* v. *United States*, 270 U. S. 175, 180-181; *Lynch* v. *United States*, 292 U. S. 571, 577.

Secondly, the government is vitally interested in preserving the heart of the 1940 Act, which is the right it accords a serviceman to designate his beneficiary (within a restricted class) and its requirement that the insurance proceeds shall be payable to and enjoyed by such beneficiary. Section 602 (g),[5] (h), Appendix A, *infra*, pp. 55-57. Under Section 608 (Appendix A, *infra*, p. 59), the Veterans Administration is charged with the duty not only of paying the proceeds of matured policies, but to pay those proceeds only as directed by the insured. The decision of the court below in applying the California community property law so as to require one-half of the proceeds of the policy to be turned over to someone other than the designated beneficiary, in contravention of the 1940 Act, deprives the latter of benefits which the insured intended the beneficiary alone to enjoy. Moreover, the decision below, by frustrating the insured's intent on

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[5] By the Act of August 1, 1946, 60 Stat. 781, a proviso was added to Section 602(g) whereby the restrictions of the Section as to the permitted class of beneficiaries were made inapplicable to National Service policies maturing on or after August 1, 1946. This proviso added by the Act of August 1, 1946, is not involved in this case. See fn. 23, *infra*, p. 55.

the basis of purely local law, thwarts the deliberate purpose of Congress to establish a national and uniform system of life insurance for the members of the armed forces, and unduly complicates the administration of the National Service Life Insurance system.

The interest of the United States is in no way lessened by the fact that it was not made a formal party to the proceeding nor by the fact that the decision below does not result in a diversion of the insurance policy proceeds until after they have been paid by the Veterans Administration to the designated beneficiary. Whether the proceeds are diverted by a court order before or after receipt thereof by the designated beneficiary, is, in the light of the 1940 and 1935 Acts, immaterial. In both instances, the significant facts are that the insured's right under the 1940 Act to designate a beneficiary, the system of distribution established by that Act, and the beneficiary's statutory right to retain the proceeds, are being violated.

SUMMARY OF ARGUMENT

As a matter of California law, it seems to be clear that a widow in that state has a community property right to one-half of the proceeds of an ordinary insurance policy taken out by her husband on his life in favor of some third party beneficiary and paid for with community funds.

Appellee contends, first, that, in similar circumstances, she has an identical right to one-half of the proceeds of a N.S.L.I. policy issued by the United States under the 1940 Act although the insured, her husband, had not designated her as even a partial beneficiary. Her second principal argument, which assumes the correctness of her initial contention, is that the 1935 Act's immunization of N.S.L.I. proceeds from legal process cannot validly prevent her from satisfying a community property judgment for an amount equal to one-half of the proceeds of the N.S.L.I. policy out of the proceeds themselves.

In Points I and II we discuss each of those contentions, respectively. Point I shows that a state statute cannot create a community property interest in a N.S.L.I. policy because the 1940 Act, under which the United States issues those policies, leaves no room for the application of state community property laws.

I

A. The main reason for foreclosing application of the California community property law is the Supremacy Clause of the Constitution. Wherever a conflict exists between a valid federal statute and a state statute, the Supremacy Clause requires "the Judges in every State" to be bound by the federal law and to reject the state law. There is no doubt in the instant case that the 1940

Act is valid and that it clashes directly with the California community property law.

1. The validity of the 1940 Act rests on the ample national defense and war powers conferred on Congress by the Constitution. Those powers make the 1940 Act, as a whole, immune from constitutional attack. Those powers also sustain the validity of such provisions of the 1940 Act as Sections 602(g) and (h) which give the insured the right to designate a beneficiary and require the policy's proceeds to be paid to that beneficiary. As observed in *Pack* v. *United States*, 176 F. 2d 770, 771 (C.A. 9), the 1940 Act imposes "the mandate that the proceeds may be paid *only* to the person designated in the policy as beneficiary. * * * We see no constitutional limitation on the power of Congress to make provision as to the manner in which the Government shall contract with holders of National Service Life Insurance."

2. The collision between the 1940 Act and the state community property law relied on by the court below is shown by the fact that specific provisions of the 1940 Act would be nullified if the state law is allowed to apply and create community property interests in N.S.L.I. policies.

(a) Sections 602(g) and (h), as noted above, require payment of the proceeds to the beneficiary selected and designated by the insured. The courts have been especially vigilant in effectuating the insured's intent that the proceeds be paid to

the beneficiary named by him. Here, the deceased could have named appellee the beneficiary. However he deliberately named his mother instead. Under Sections 602(g) and (h) the mother alone is entitled to the proceeds.

Under the community property statutes of California, as applied by the court below, the mother is entitled to only one-half of the proceeds and the other one-half goes to appellee. This result frustrates the insured's express intent not to have appellee share in the proceeds. At the same time it reads out of the 1940 Act its most important provision—that directing payment only to the designated beneficiary.

(b) Section 602(i) of the 1940 Act would also be made meaningless if community property interests in N.S.L.I. policies were recognized. That section declares that "no person shall have a vested right" to any insurance proceeds. The California law, however, recognizes that at the time of the insured's death there vests a community property right to one-half of the proceeds. This result is at war with Section 602(i) and puts appellee in a more preferred position than she would have been in had the insured actually named her as the beneficiary.

(c) Similarly, if appellee is regarded as having a vested right to one-half of the proceeds as of the insured's death, it is obvious that upon her death any unpaid installments would go to her

heirs or legal representatives, in violation of the express prohibition contained in Section 602(j) of the Act.

(d) Under the 1940 Act the decisions of the Administrator of Veterans' Affairs on questions arising under N.S.L.I. policies are conclusive unless overturned in federal courts. Here, appellee's administrative claim was rejected by the Veterans Administration. Despite the provisions of the 1940 Act, appellee, on the basis of the state community property law, obtained a reversal of the administrative decision in a state court.

3. (a) The comprehensive and detailed nature of the 1940 Act, together with the need for its uniform administration on a national basis, further emphasize the conflict of its provisions with those of the California law.

(b) A consistent administrative interpretation, dating back to at least 1920, confirms the view that the conflict can be avoided only by foreclosing application of the state statute and thus preventing the creation of community property rights in N.S.L.I. policies.

4. Since the 1940 Act clashes with the California community property law in many respects, and since the 1940 Act is fully within congressional power, the Constitution requires that the state law be held inapplicable. Any other holding would nullify the Supremacy Clause and allow

appellee to achieve in a state court a result which all of the federal courts have rejected as forbidden by the 1940 Act.

B. Apart from the Supremacy Clause, there is no room for doubt that a N.S.L.I. policy, being a federal contract founded on a federal statute, must be interpreted in the light of federal law.

This Court, with respect to government contracts in general, has regularly applied federal law, rather than state law. There is no justification for applying state law to N.S.L.I. policies, which create recognized contractual obligations between the Government and the insured. In fact, since the insured is a member of the armed forces, the need for applying federal law is even greater than in the ordinary government contract situation. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 305-306.

II

Even if we were to assume that the California law may be applied here so as to create a community property interest in the N.S.L.I. policy, the judgment below is nevertheless in error, because, in contravention of the provisions of the 1935 Act, it subjects the N.S.L.I. proceeds themselves to legal process and directs that the community property claim be satisfied out of such proceeds. That error is in no way mitigated by the fact that the proceeds at which the judgment

is directed have been paid out by the Veterans Administration and are in the hands of the designated beneficiary.

A. The 1940 Act incorporates by reference the provisions of the 1935 Act. The latter Act expressly frees N.S.L.I. proceeds from "any legal or equitable process whatever, either before or after receipt by the beneficiary."

This Court's previous observation that the 1935 Act was largely designed to protect the beneficiary *after* he received the payments from the Government, (*Lawrence* v. *Shaw*, 300 U. S. 245, 249; see *Carrier* v. *Bryant*, 306 U. S. 545, 547) finds strong support in the 1935 Act's legislative history. Thus, the terms of the 1935 Act, and judicial and congressional recognition of its purpose, completely undermine appellee's contention that the federal statutory immunity ceases upon payment of the insurance proceeds to the designated beneficiary. It is equally clear that the judgment below, which acts directly on the past and future proceeds by requiring the beneficiary to turn one-half of them over to appellee, is invalid.

B. The 1935 Act, in exempting N.S.L.I. proceeds from judicial process after they have been received by the designated beneficiary from the Veterans Administration, does not deprive appellee of any vested rights without due process of law.

1. The 1940 Act, and the 1935 Act which it incorporated, were enacted long before any of ap-

pellee's rights allegedly "vested" under California law. The community property rights she claims could not, therefore, have been improperly "divested" by either of those Acts. Moreover, the 1940 Act specifically provided that no person shall have "a vested right" to the proceeds of a N.S.L.I. policy.

2. In any event, it has always been recognized that the destruction of a right, even if vested, does not in itself render a statute invalid on substantive due process grounds. Where the federal statute is based on some paramount federal power, the legislation has been upheld, if the means are reasonable to accomplish the permitted goal, even though it may set aside vested rights.

No federal court, nor any state court, other than the court below, has cast doubt on the constitutionality of the 1935 Act. This Court, in *Lawrence* v. *Shaw*, 300 U. S. 245, examined the 1935 Act and held that its exemption protects federal payments after their receipt by the beneficiary, not only while they are in his hands, but also while they are on deposit in his checking account. The *Shaw* case does not discuss the constitutionality of the 1935 Act. It assumes it. See *Culp* v. *Webster*, 25 Col. App. (Sup.) 2d 759.

ARGUMENT

I

Community Property Interests under State Statutes Cannot Exist in Policies Issued under the National Service Life Insurance Act of 1940

At the outset, and in an order to bring the problem into proper focus, we shall assume *arguendo* that, under California law, an ordinary insurance policy, taken out by a married soldier and paid for out of his service pay, is not his separate property but constitutes community property.[5a] On that assumption, the California community property law appears to require the payment to the deceased soldier's widow of one-half of the proceeds of any such policy, issued by a private insurance company, even though the insured designated someone else as the beneficiary.[6] Appellee contends that the California law affects the distribution of the proceeds of a N.S.L.I. policy issued by the United States just as it does that of any private policy. She urges, therefore, that a widow in California has (1) a community property right to a judgment for an amount equal to one-half of the proceeds of a N.S.L.I. policy, and (2) a right to have that judgment satisfied out of those proceeds.

[5a] But see fn. 19, *infra*, p. 43.

[6] *New York Life Insurance Co.* v. *Bank of Italy*, 60 Cal. App. 602, 607; *Modern Woodmen of America* v. *Gray*, 113 Cal. App. 729; *Mazman* v. *Brown*, 12 Cal. App. 2d 272; *Union Mutual Life Ins. Co.* v. *Broderick*, 196 Cal. 497; *Blethen* v. *Pacific Mutual Life Ins. Co.*, 198 Cal. 91, 98; *Travelers Ins. Co.* v. *Fancher*, 219 Cal. 351.

despite the provision of the 1935 Act. Appellants and the United States, on the contrary, take the position that (1) the 1940 Act precludes the application of the California community property law to government soldier's insurance, and thus renders impossible the existence of any community property interest in N.S.L.I. policies, and that (2) even if such a community property interest does exist, a judgment awarding such an interest to the widow cannot, because of the provisions of the 1935 Act, be satisfied out of the proceeds directly, but may be satisfied, if at all, only out of other assets owned by the designated beneficiary. Our Point I discusses the first phase of the case. We show that the 1940 Act leaves no room for the application of the California community property law, and that that law cannot therefore create any interest in N.S.L.I. policies.[7]

A. *Where state law conflicts with a valid federal law, as it does here, the "Supremacy Clause" requires application of the federal law*

Although the federal government is one of enumerated powers, Article 6, Clause 2 of the Constitution makes those powers supreme over any conflicting state laws. *Testa* v. *Katt*, 330 U. S. 386; see *Ex Parte Siebold*, 100 U. S. 371, 392; *Claflin*

[7] In Point II, we shall assume the existence of a community property interest in N.S.L.I. policies and show that, because of the provisions of the 1935 Act, a judgment awarding such an interest may not be satisfied out of the insurance proceeds themselves.

v. *Houseman*, 93 U. S. 130. The Clause unambiguously provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The manifest purpose of the Supremacy Clause is to remove all state obstacles to the performance by the Federal Government of any of its functions and so modifies "every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch* v. *Maryland*, 4 Wheat. 316, 427. A federal statute, unless unconstitutional, cannot be challenged as inconsistent with state law. This freedom from conflicting state regulation, announced in many decisions of this Court,[8] is coextensive with the scope of federal

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[8] As this Court remarked in *United States* v. *Belmont*, 301 U. S. 324, 331-332:

> * * * Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. * * *

This principle precludes the states from interference with the property, operations, or functions of the United States. Because the United States "may perform its functions without conforming to the police regulations of a State," it may con-

power, for every authorized activity of the United States is an exercise of its governmental power. *Graves* v. *N. Y. el rel O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102.

The court below, ignoring these fundamental principles, rejected the applicable federal law, and applied instead the conflicting provisions of state law, *i.e.* the California community property law. Review of the constitutional basis of the 1940 Act, its controlling provisions, and those of the state law invoked by the court below, underscores the

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struct a dam and reservoir in a state without securing approval of its plans and specifications by the state engineer as required by state statute (*Arizona* v. *California*, 283 U. S. 423, 451); and it may operate soldiers' homes without complying with state inspection or police regulations (*Ohio* v. *Thomas*, 173 U. S. 276). So, too, the driver of a mail truck for the Post Office Department cannot be required to comply with state driving license requirements (*Johnson* v. *Maryland*, 254 U. S. 51), nor may federal agents in a national forest and game preserve be subject to the hunting restrictions of the state in which the preserve is located (*Hunt* v. *United States*, 278 U. S. 96). The United States may enforce a lien for taxes upon real estate under the internal revenue laws without complying with state law requiring recordation and timely enforcement (*United States* v. *Snyder*, 149 U. S. 210); and a claim of the Government against a decedent's estate will not be barred by failure to file within the time required by state law. *United States* v. *Summerlin*, 310 U. S. 414. The United States may distrib. fertilizer to consumers in Florida without complying with a state inspection act. *Mayo* v. *United States*, 319 U. S. 441. See, also *Osborn* v. *United States Bank*, 9 Wheat. 738; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590-591; *Tennessee* v. *Davis*, 100 U. S. 257, 263; *In re Neagle*, 135 U. S. 1; *McCune* v. *Essig*, 199 U. S. 382; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U. S. 261; *Ruddy* v. *Rossi*, 248 U. S. 104; *United States* v. *San Francisco*, 310 U. S. 16.

conflict between the federal and state statutory provisions and emphasizes the need for compliance with the mandate of the Supremacy Clause.

1. Appellee does not doubt the constitutional power of Congress to provide by statute a system of life insurance for the members of the armed forces (Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, p. 5). Ample basis for the enactment may be found in the national defense and war powers conferred by the Constitution. Article I, Section 8, grants Congress the following express powers:

> (a) To * * * provide for the common Defence and general Welfare of the United States * * *.
>
> (b) To declare War * * *.
>
> (c) To raise and support Armies * * *.
>
> (d) To provide and maintain a Navy * * *.
>
> (e) To provide for calling forth the Militia.

In addition, the Preamble emphasizes the establishment of the Constitution so as to "provide for the common defence."

Any one of these clauses would sustain the legislation. Their combination in the Constitution explains why the 1940 Act, as well as the previous forms of government servicemen's insurance on which it was modelled—the Act of October 6, 1917, 40 Stat. 398, 409, 410 (war risk insurance) and the

World War Veterans Act of 1924, 43 Stat. 607, 624 (United States Government Life Insurance)[9] —have been immune from constitutional attack. It also accounts for the fact that statutory provisions deemed by Congress reasonably necessary to effectuate the purposes of the 1940 Act, such as Sections 602(g) and (h), giving the insured the right to designate his beneficiary and requiring the proceeds to be paid to that beneficiary, have never been, and are not here, assailed as lacking constitutional basis. "Thus, the contract of insurance issued by the Government has certain restrictions and limitations placed thereon by Congress, among which is the mandate that the proceeds may be paid *only* to the person designated in the policy as beneficiary. * * * We see no constitutional limitation on the power of Congress to make provision as to the manner in which the Government shall contract with holders of National Service Life Insurance." *Pack* v. *United States*, 176 F. 2d 770, 771 (C.A. 9). By the same token, there is no reason why Congress could not constitutionally provide expressly, or implicitly, as we show below was done by the provisions of the 1940 Act, that state laws shall be inoperative to create community property interests in N.S.L.I. policies.

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[9] Senator Harrison, in charge of the bill which became the N.S.L.I. Act, pointed out: "This [national service life] insurance is similar to war-risk insurance with certain modifications based on experience gained over the past 20 years. * * * There is not much difference between the two." (86 Cong. Rec. 12920).

2. Since the provisions of the 1940 Act are valid, the Supremacy Clause requires adherence to those provisions whenever they collide with state law. That such a conflict exists here is evidenced by comparison of the federal statutory provisions and the state law relied on by the court below. Specific provisions of the 1940 Act would be nullified by forcing application of the state laws so as to create community property interests in N.S.L.I. policies or proceeds.

(a) We start with the critical terms of the 1940 Act. They reflect a deliberate congressional purpose to require the proceeds of a N.S.L.I. policy to be paid to the beneficiary designated by the insured soldier. Section 602(g) provides "the insured shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and * * * at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries." Section 602(h) requires payment of the proceeds to the beneficiary so designated. The regulations of the Veterans Administration implement the statute by directing payment to the designated beneficiary. See 38 C.F.R. secs. 10.3446-10.3448 (1941 Supp.). The courts have consistently assumed that the statute means what it says. As a result, they have been especially vigilant in safeguarding the rights of the statutory beneficiary designated by the insured soldier and have swept

aside all technicalities in order to effectuate insured's intention that the proceeds be paid to the beneficiary named by him. *Bradley* v. *United States*, 143 F. 2d 573, 576 (C.A. 10), certiorari denied, *sub nom Bradley* v. *Bradley*, 323 U. S. 793; *Roberts* v. *United States*, 157 F. 2d 906, 909 (C.A. 4), certiorari denied, *sub nom Roberts* v. *Roberts*, 330 U. S. 829; *Mitchell* v. *United States*, 165 F. 2d 758, 760 (C. A. 5).

Here, as the 1940 Act permitted, the insured designated his mother as principal beneficiary (R. 13). Neither appellee nor the court below questions that designation nor disputes the fact that the beneficiary so designated was the one intended by the insured to receive the proceeds. Applying the clear provisions of Section 602(g) and (h) to this case, it is apparent that the designated beneficiary alone is entitled to the proceeds.

We turn then to the California law relied on by the court below. The pertinent provisions of the community property laws of California are set forth in that State's Civil Code, Sections 162, 163, 164, 161a and 172. Section 162 provides that all property of the wife acquired before marriage or by way of gift or devise is her separate property. Section 163 similarly defines the husband's separate property. All other property acquired by either spouse is declared by Section 164 to be community property. Section 161a authorizes the husband to manage and control the community property, but Section 172 prohibits him from making a valid

gift of more than one-half of such property, without the written consent of his wife. Section 172 was cited in *Mazman* v. *Brown*, 12 Cal. App. 2d 272, a leading case on the application of community property laws to control distribution of insurance proceeds, for the following proposition (p. 275):

> Under the law as it has been settled in this state, the insured could not make a valid gift of the proceeds of insurance purchased with community funds in excess of 50 per cent thereof, without the written consent of the wife. (Civ. Code, sec. 172; * * *).

The court below expressly relied on this California law as interpreted in the *Mazman* case (R. 24), held the insured's designation of his mother ineffective as to 50 per cent of each of the monthly payments under the policy, and awarded that 50 per cent to appellee, who was not designated by the insured as a beneficiary. This result flies in the face of the provisions of the 1940 Act which require the entire amount of each monthly installment to be paid the designated beneficiary for the rest of her life.[10] At the same time it reads out of the 1940 Act its most important provision—that

[10] Section 602(h)(3) of the N.S.L.I. Act does recognize that appellee may eventually receive some of the monthly installments. Thus, as pointed out in footnote 3, *supra*, p. 4, if the designated principal beneficiary (Louise M. Wissner) and the designated contingent beneficiary (Leandous H. Wissner) should die before receipt of 120 monthly installments from the Veterans Administration, the entire remainder of those payments would be paid to appellee as the surviving widow of the insured.

directing payment of the proceeds to the *beneficiary designated by the insured.*

(b) Additional provisions of the 1940 Act would be made meaningless or inoperative if community property interests in N.S.L.I. policies were recognized. Thus, Section 602(i), Appendix A, *infra*, pp. 57-58, provides that "the right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority * * *." See 38 C.F.R. 10.3449 (1941 Supp.). If the community property laws of the state apply to N.S.L.I. proceeds, those proceeds would then become the absolute property of the appellee, the widow, at the moment of her spouse's death. *N. Y. Life Insurance Co.* v. *Bank of Italy*, 60 Cal. App. 602, 607, sets forth the applicable California law by pointing out that "the interest of the wife *eo instanti* ripened and was payable at the instant of the husband's death. * * * at the same moment the community interest of the wife [*i.e.* in the insurance policy in which her husband had not designated her as the beneficiary] vested in her." This result is inconsistent with the language just quoted from Section 602(i), which expressly prohibits the surviving spouse from hav-

ing any vested rights in N.S.L.I. insurance. Even if the insured had designated appellee as principal beneficiary for one-half of the proceeds, her only rights under the 1940 Act would be to receive each monthly payment as it became due, conditioned on her being alive to receive such payments. Thus, application of the community property law here places the widow in a more advantageous position than she would have been in—under the 1940 Act—had she been named by the insured as the principal beneficiary for one-half of the policy's proceeds.

(c) Similarly, Section 602(j), Appendix A, *infra*, p. 58, prohibits payments of benefits to the heirs or legal representatives as such, of either the insured or the designated beneficiary. If appellee is allowed to take the proceeds under the community property law theory which considers her right to the proceeds as having vested instantly upon the maturity of the policy, it is obvious that upon her death, any unpaid installments would go to her heirs or legal representatives, in violation of Section 602(j).

(d) Section 608, Appendix A, *infra*, p. 59, states that, except in the event of suit as provided in Section 617, decisions rendered by the Adminstrator of Veterans' Affairs "shall be final and conclusive on all questions of law and fact." Section 617 authorizes suits to be brought against the United States in the event of disagreement as to a claim

under the Act, but provides that such suits shall be subject to the "same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 19 and 500 of the World War Veterans' Act, 1924, as amended." Section 19 (38 U.S.C. 445), in turn, requires that such a suit be brought against the United States in a federal district court. These provisions remove all doubt that the Administrator's determination is conclusive unless overturned in the *federal* courts.

Application of the state's community property law to the distribution of N.S.L.I. proceeds wipes out the finality accorded by the 1940 Act to the Administrator's determinations and subjects those determinations to review by state courts, in clear violation of the statutory requirement allowing review only in the federal district courts. The facts of the instant case emphasize this violation. Appellee filed an administrative claim with the Veterans Administration, alleging a community property right to one-half of the proceeds. (Appendix B, *infra*, pp. 68-69). The Administrator, acting under Section 608's direction to him to carry out the purpose of the 1940 Act and "decide all questions arising" under that Act, rejected her claim (Appendix B, *infra*, pp. 70-71). That rejection, by the express terms of Section 608, is final and conclusive, unless review was sought in a federal district court. No such review was sought here. Instead, appellee went into a state court, alleging the

same community property claim rejected by the Administrator, and there obtained a reversal of the Administrator's decision, a result repugnant to the precise terms of Section 608.[11]

3. This conflict between the provisions of the 1940 Act and those of the state law is underscored by the examination of the comprehensive and detailed nature of the 1940 Act and the need for its uniform administration on a national basis. In addition, a consistent administrative interpretation, dating back to at least 1920, shows that the conflict between federal and state laws can be avoided only by rejecting, *in toto*, the bearing of state community property laws on N.S.L.I. policies.

(a) State law could, of course, apply if it were shown that Congress had expressly or tacitly di-

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[11] Still further proof that it was never intended that state laws should give rise to community property interests in N.S.L.I. policies is shown by the provisions of the 1935 Act, discussed, *infra*, pp. 43-54. That Act, which is part of the 1940 Act, immunizes N.S.L.I. proceeds from all legal process. Obviously, the recognition of a community property interest in N.S.L.I. proceeds is absolutely meaningless if the proceeds are exempt from process, at least where those proceeds are the only assets held by the beneficiary against whom the widow asserts her community property claim.

In addition, Section 500 of the World War Veterans Act of 1924 (38 U.S.C. 551), incorporated by reference into Section 617 of the 1940 Act, as pointed out above, p. 29, limits attorney's fees to 10% of the insurance proceeds recovered. This limitation may be avoided where, as here, suit to reverse the Administrator's decision is brought in a state court, without notice to the Administrator, rather than in the federal district court as required by the N.S.L.I. Act. Cf. *Hines* v. *Lowrey*, 305 U.S. 85.

rected that state law should be accepted as a federal rule. *Childers* v. *Beaver*, 270 U. S. 555, 559; *Board of County Commissioners* v. *United States*, 308 U. S. 343, 349-350; cf. use of state law required by the Federal Tort Claims Act (28 U.S.C. 1346 (b)). But here Congress, by the comprehensive and detailed nature of the life insurance system it set up in the 1940 Act, has demonstrated its desire to achieve a national and uniform administration of the Act and an intent to leave no room for applying varying state laws. Every possible phase and stage of the insurance program is carefully dealt with in the Act: the qualifications for insurability; the type and plan of insurance; the conversion and exchange privileges; the ceiling on the amount of the insurance; the basis for computation of premium rates; the time and method of premium payments; the waiver of premiums during continuous total disability; the designation of beneficiaries; the manner of payment of benefits to beneficiaries; and the payment of benefits where the beneficiary is undesignated or dead. These and many other express, detailed provisions of the 1940 Act show the care with which the insurance program was established by Congress. At the same time, they make inescapable the conclusion that had Congress intended to place community property limitations on the rights of beneficiaries, those limitations would have also been expressed in detail. *Barton* v. *United States*, 75 F. Supp. 703 (S.D. Calif.), a recent government insurance case comparable to

the present one, emphasizes the need for rejecting such limitations. The court in that case, referring to the detailed provisions of the 1940 Act, stated (75 F. Supp. at 705):

> The cited provisions are persuasive that it was the purpose of Congress to provide in all details for the issuance and administration and settlement of service life insurance on a national basis, as the title of the Act implies. [James Stewart & Co. *v.* Sadrakula, 1940, 309 U. S. 94, 103, 104, 60 S. Ct. 431, 84 L. Ed. 596, 127 A.L.R. 821; New York Central R.R. Co. *v.* Winfield, 1917, 244 U. S. 147, 153, 37 S. Ct. 546, 61 L. Ed. 1045, L.R.A. 1918C, 439, Ann. Cas. 1917D, 1139; United States *v.* Fuller, 5 Cir., 1938, 97 F. 2d 541, 542.]

This need for uniform administration, required by the detailed provisions of the 1940 Act, would be frustrated in various ways if N.S.L.I. proceeds were distributed in accordance with community property laws of the several states. First, in non-community property states, the insured's desire to have the proceeds of the policy paid to the beneficiary would be fully effectuated; in the community property states it would not.[12] Second, the community property laws of the various states vary considerably as to the extent to which a widow may share in the proceeds of her husband's life

[12] The following have adopted community property laws: California, Louisiana, Oklahoma, Texas, Idaho, Washington, Arizona, Nevada, New Mexico, Oregon, Hawaii, Michigan and Nebraska. See de Funiak, *Principles of Community Property* (1943 ed. and 1948 Cum. Supp.), vol. 1, ch. 4.

insurance policies made payable to third persons. Thus, in Washington, the entire proceeds of such a policy must go to the widow, regardless of whom the insured named as beneficiary. *Occidental Life Insurance Co. v. Powers*, 192 Wash. 475. This differs sharply from the California rule, where the wife is entitled to half of the proceeds unless she has consented in writing to the naming of a third beneficiary. *Mazman v. Brown*, 12 Cal. App. 2d 272; see cases cited *supra*, fn. 6, p. 18. In Texas, the rule seems to be that the surviving wife can recover no portion of the proceeds unless it is shown that the husband had named the third person as beneficiary for the purpose of defrauding the wife. *Rowlett v. Mitchell*, 52 Tex. Civ. App. 589, 592. Where proof of such fraud is made, the widow in Texas may recover the entire proceeds of the policy. *Moore v. California-Western States Life Ins. Co.*, 67 S. W. 2d 932 (Tex. Civ. App.). Third, the fact that free N.S.L.I. insurance was granted to many servicemen will, by itself, effect a different distribution of policy proceeds within the same community property state. For example, appellee's claim is bottomed on her assertion that the insured's earnings were used in paying the premiums. In many cases, however, N.S.L.I. policies, carrying the maximum coverage of $10,000, were issued under a federal statute stating "that the premiums shall be paid by the Government." Act of July 3, 1941, 55 Stat. 240, as amended, 10 U.S.C. 308a. If the latter type of

policy had been issued in the instant case, application of the community property law would have compelled the state court to reject the widow's claim completely. Still further complications might arise where the serviceman changes his domicile from a community property state to a non-community property state, or vice versa, and premiums are paid during both periods.

(b) A consistent administrative construction fortifies the view that the conflict can be avoided only by a holding that state community property laws furnish no basis for the creation of a community property interest. At least since 1920 it has been uniformly held by the Veterans Administration and its predecessor agencies, the Bureau of War Risk Insurance and the Veterans Bureau, that such state property laws have no application to the servicemens' insurance proceeds. See Appendix B, *infra*, pp. 60-71.[13]

Following the often-applied general principle

[13] The letter from the Veterans Administration points out that where the *estate*, rather than a particular designated beneficiary, was entitled to the proceeds, state community property laws control the distribution of that estate. Appendix B, *infra*, pp. 62, 65. This result is required by the congressional direction that state law shall apply when the proceeds are paid to the insured's estate. *United States* v. *Robinson*, 40 F. 2d 14, 16 (C. A. 5). In the instant case, there is no question that the proceeds are being paid to the particular beneficiary designated by the insured. Therefore, the *Robinson* case, and others like it relied on by appellee at page 15 of her Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, are obviously inapplicable to the instant case.

of deference to administrative construction, this Court has already recognized that the consistent administrative construction given government insurance legislation by the Veterans Administration "is entitled to great weight, 'and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.' *United States* v. *Jackson*, 280 U. S. 183, 193." *United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209, 214 (payment of war-risk insurance); *United States* v. *Madigan*, 300 U. S. 500, 505 (revival of war-risk policy). This general rule has, of course, special applicability to the National Service Life Insurance system, for "administrative practice, consistent and generally unchallenged * * * has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Assn's, Inc.*, 310 U. S. 534, 549; *Adams* v. *United States*, 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby*, 12 Wheat. 207, 210), especially where, as here, the agency participated in drafting the measure.[14] *United States* v. *American Trucking Assns., ibid.*

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[14] The Veterans Administration participated actively in the drafting of the measure which became the N. S. L. I. Act. The major provisions of that Act were suggested by the

4. These considerations, we submit, show that the clash between the 1940 Act and California's community property laws is direct and immediate. It is also plain that the federal statute is fully within congressional power. (*Supra*, pp. 22-23.) In such circumstances, the Constitution requires that the state law yield to the federal;[15] here, that requirement can be fulfilled only by holding that the community property laws of California do not give rise to any interest in N. S. L. I. policies.

A contrary holding, as we have shown, would circumvent the 1940 Act and profoundly interfere with the Congressional scheme for National Service Life Insurance. The instant case, for example, is nothing more than an attempt by appellee to obtain, in a state court, a result forbidden by the 1940 Act. In fact, appellee concedes that her claim would have proven abortive had it been brought in a federal court directly against the United States to compel payment to her of half the proceeds of

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Veterans Administration. In that drafting the Veterans Administration evidently drew upon the experience it had acquired in administering the prior service insurance legislation, which was closely followed in establishing the N. S. L. I. system. 86 Cong. Rec. 12920. See *supra*, fn. 9, p. 23.

[15] See *Davies* v. *Beach*, 74 Cal. App. 2d 304, 309, where the court, recognizing the Supremacy Clause, held that the state statutory right of bequest "is not paramount" to the power of the federal government to control the distribution of proceeds of United States savings bonds. Accord: *Myers* v. *Hardin, Admr.* 208 Ark. 505; *Meyer* v. *Mercier*, 102 Colo. 422; *In re Briley's Estate*, 155 Fla. 798; *Harvey* v. *Rackliffe*, 141 Me. 169; *Franklin Washington Trust Co.* v. *Beltram*, 133 N. J. Eq. 11; *United States* v. *Dauphin Deposit Trust Co.*, 50 F. Supp. 73 (M. D. Pa.).

the policy. (Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, p. 4). All of the federal cases have rejected attempts to compel the United States to divert one-half of the proceeds of a N. S. L. I. policy from a designated beneficiary to a widow asserting a community property claim. *Pack* v. *United States*, 176 F. 2d 770 (C. A. 9); *Barton* v. *United States*, 75 F. Supp. 703 (S. D. Calif.); *James* v. *United States*, No. 6061-B.H. (S. D. Calif.); *Rhodes* v. *United States*, No. 5845-B (S. D. Calif.); *Hayek* v. *Hayek and United States*, No. 7400-W (S. D. Calif.). As stated in the *Pack* case:

> Appellant insists, however, that a different situation exists here in that she has a vested right in the proceeds by reason of the California community property law and a congressional act divesting her of that right would be void as contrary to the Fifth Amendment. The vested right is based upon the use of community funds to pay premiums. The vested right, if it exists, cannot be asserted against the Government. The Government, by reason of congressional mandate must pay the proceeds to the mother, the beneficiary named in the policy. This is essentially so in order to permit the Veterans Administration to administer the Act in a uniform manner.[16]

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[16] Dictum in the *Pack* case concerning the possibility of asserting the community property claim in a state court lends some support to the conclusion reached by the court below (176 F. 2d 770, 771). But that point was not neces-

Three lower California courts have reached the same conclusion where, as here, the widow instituted suit against the designated beneficiary. *Johnson* v. *Shelton*,[17] No. 522,648 (Sup. Ct. of Calif., Co. of Los Angeles); *Nobles* v. *Cannell*, No. 502,587 (Sup. Ct. of Calif., Co. of Los Angeles) (where the court stated that "the community property laws of the State of California confer no rights on plaintiff to share in the proceeds of the policy"); *Thomas* v. *Thomas*, No. 547,835 (Sup. Ct. of Calif., Co. of Los Angeles) (where the court expressly rejected the decision of the District Court of Appeal in the instant case). Contra: *Carballo* v. *McFann*, No. 543,410 (Sup. Ct. of Calif., Co. of Los Angeles).

In particular, the nature of the relief prayed for in this case, together with the form in which the district court's judgment was cast, clearly expose the purpose of the state court proceeding to defeat the policy expressed in the 1940 Act by reversing the order of the statutory provisions relating to N. S. L. I. beneficiaries and by giving to others interests denied to them by those provisions. The complaint makes it clear that it seeks to impress a trust on the proceeds as they are received by the designated beneficiaries in order to enable a non-designated beneficiary to obtain the beneficial use of the proceeds. The complaint alleges,

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sary to the decision and the Court of Appeals for the Ninth Circuit did not even discuss the import of the 1935 Act upon such suit. See *infra*, pp. 43-54.

[17] The opinion in this case is reprinted at p. 26 of Appellant's Statement as to Jurisdiction.

that one-half of the proceeds already received were "received for the use and benefit" of the widow (R. 4). Judgment for those proceeds as well as a court order that the designated beneficiary pay over to the widow "one-half of all moneys hereafter received from the proceeds of the said insurance policy immediately upon the receipt thereof" was demanded by the complaint (R. 6-7). The trial court granted the relief sought in full, thus thwarting the express policy of the 1940 Act by asserting the laws of the state against the laws of the United States and by imposing restrictions on the rights of N. S. L. I. beneficiaries prohibited by, and inconsistent with, the 1940 Act. The need for avoiding such a result, in order to avoid nullification of the Supremacy Clause, is apparent. Cf. *McCune v. Essig*, 199 U. S. 382.

B. ***Even if the federal statute did not conflict with state laws, federal law must control the distribution of proceeds of a N.S.L.I. policy.***

N.S.L.I. policies are federal government contracts, based on federal statutes, and must therefore be interpreted in light of federal law, regardless of the law of the state in which the contract was made or is being fulfilled. It is immaterial, in such a situation, whether state and federal laws are incompatible. As stated in *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604, "When Congress has taken the particular subject-matter in hand coincidence is as

ineffective as opposition * * *." Cf. *Hines* v. *Davidowitz*, 312 U. S. 52.

1. It is familiar law that the rights and obligations under a federal contract present a federal question and must be answered in light of federal rather than state law. In a consistent line of decisions by this Court, it has been established that "in the interpretation and application of federal statutes, federal not local law applies" (*Prudence Corp.* v. *Geist*, 316 U. S. 89, 95), and that where a claim is derived from a federal statute, "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245, 246. See also *Board of County Commissioners* v. *United States*, 308 U. S. 343, 351; *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 459, 468-469; *Jerome* v. *United States*, 318 U. S. 101, 104; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *Midstate Horticultural Co.* v. *Penna. R. Co.*, 320 U. S. 356; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123.

As far as government contracts in general are concerned, this Court has regularly applied federal law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *United States* v. *County of Allegheny*, 322 U. S. 174, 183.

2. This same rule must be applied to N.S.L.I. policies. They are contracts of the United States. In *United States* v. *Zazove*, 334 U. S. 602, 611, fn. 12, Chief Justice Vinson, speaking for a unanimous court, observed that these policies "give rise to an obligation that has the force of a binding contract with the serviceman insured. See *Lynch* v. *United States*, 292 U. S. 571, 579 (1934)." Since they are federal contracts, their interpretation presents a question of federal law not controlled by the law of any state. As stated in *Woodward* v. *United States*, 167 F. 2d 774, 778-779 (C. A. 8):

> Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts. *Lynch* v. *United States*, 292 U. S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434. The validity and construction of such policies present questions of federal law. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366, 63 S. Ct. 573, 87 L. Ed. 838; *United States* v. *County of Allegheny*, 322 U. S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209.

Accord: *Pack* v. *United States*, 176 F. 2d 770 (C. A. 9); *United States* v. *Fuller*, 97 F. 2d 541, 542 (C. A. 5); *Cassarello* v. *United States*, 271 Fed. 486 (M. D. Pa.), affirmed, 279 Fed. 396 (C. A. 3).

The particular transaction involved in the instant case emphasizes the need for applying federal law. What is involved here are conflicting claims to the proceeds of a contractual obligation undertaken

by the Government under the 1940 Act, which, as we have shown above, is in direct furtherance of the war powers conferred on the Congress by the Constitution. This Court has pointed out that in the soldier-insurance situation "the only relations of contract [are] between the Government" and the insured serviceman. *White* v. *United States*, 270 U. S. 175, 180. See *Von Der Lippi-Lipski* v. *United States*, 4 F. 2d 168 (C. A. D. C.); *United States* v. *Sterling*, 12 F. 2d 921 (C. A. 2). And, furthermore, this Court has completely dispelled any doubt that the "scope, nature, legal incidents and consequences" of the Government-serviceman relation, as well as any interferences therewith, raise federal questions governed only by federal law free from modification by state law. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 305, 306.[18]

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[18] That case recognizes that:

"Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. See *Tarble's Case*, 13 Wall. 397; *Kurtz* v. *Moffitt*, 115 U. S. 487. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others." (332 U. S. 301, 305, 306).

A Judgment Directing the Satisfaction of a Community Property Claim Out of N.S.L.I. Proceeds in the Hands of the Designated Beneficiary Is Invalid under the 1935 Act (Incorporated into the 1940 Act)

Appellee's case is bottomed on the assumption that the California community property law confers upon her an interest in the N.S.L.I. policy here involved. In Point I we have set forth the reasons showing the unsoundness of that assumption. Even if we were to accept that assumption,[19] however, the judgment below is in error because it directs the satisfaction of the community property claim out of N.S.L.I. proceeds in the hands of the designated beneficiary. Appellee's argument, on this

[19] We should, however, like to point out the error in the further necessary assumption made by the court below that the premiums on the N. S. L. I. policy in this case were paid from community funds (R. 21). See Appellant's Brief in Opposition to Motion of Appellee for Affirmation of Judgment of State Court and Dismissal of Appeal, p. 50. Even under the community property laws, a soldier's pay is generally considered separate property rather than earnings which fall into the community. The Spanish law of community property, which has been adopted as the basis for the community property system in California (*Packard* v. *Arellanes*, 17 Cal. 525, 531), provides that military pay belongs to the husband alone. de Funiak, *Principles of Community Property*, vol. 1, p. 193; vol. 2, pp. 13, 272. *Johnson* v. *Shelton*, No. 522,648 (Superior Ct. of Cal.); reprinted at p. 26 of Appellant's Statement as to Jurisdiction) expressly refused to follow the court below and "observed that in the instant case the insurance premiums were paid by deducting their amount from the pay of the veteran. In one aspect such pay represents a gift by the government rather than earnings, because the government can compel any person to serve in its armed services without pay (*United States* v. *Williams*, 302 U. S. 46)." In the present case, the premiums were also paid by deduction from the husband's pay. R. 3, 8, 13.

aspect of the case, seems to be that the protection afforded to the designated beneficiary by the 1940 Act ends with "the payment of the benefits due, under the insurance, to the beneficiary named by the insured"—(Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, p. 5). After such payment is made by the Veterans Administration and the proceeds "are in the hands of the beneficiary," a judgment under the community property laws of California, appellee contends, may divert one-half of the actual proceeds of the policy from the designated beneficiary to the appellee. There is a short and conclusive answer to this argument: Congress, in the 1935 Act, has expressly provided otherwise, and that provision does not violate any of appellee's property rights under the Fifth Amendment.

A. *The 1935 Act expressly immunizes N.S.L.I. proceeds against claims and attachment even after the proceeds have been received by the beneficiary*

Section 616 of the 1940 Act incorporates by reference "the provisions of Public Law Numbered 262, Seventy-fourth Congress, approved August 12, 1935 (49 Stat. 607)." The 1935 Act, codified at 38 U. S. C. 454a, provides:

> Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be

> exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, *either before or after receipt by the beneficiary* • • • (Italics ours).

This 1935 Act rewrote the provisions of Section 22 of the World War Veterans Act for the express purpose of making it clear that the freedom of insurance payments (and of any other payments under veterans laws) from taxation, claims, and attachment, levy or seizure, was *not* to be cut off at the time of the receipt of the payments by the beneficiary. Prior to the addition of the above-italicized clause in the 1935 Act, there had been some doubts as to whether the immunity conferred by Section 22 protected the beneficiary subsequent to his receipt of the payments. *Trotter* v. *Tennessee*, 290 U. S. 354; *McIntosh* v. *Aubrey*, 185 U. S. 122. The italicized language was inserted into the Act to set at rest the doubts created by these decisions. See S. Rep. 1072,[20] 74th Cong., 1st sess., pp. 6-7.

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[20] S. Rep. 1072 was the report of the Senate Committee on Finance on H. R. 3979, which became the Act of August 12, 1935. The legislative history of that Act is as follows: H. R. 3979, was introduced on January 16, 1935 for the purpose of safeguarding "the estates of veterans derived from payments of pension, compensation, emergency officers' retirement pay and insurance • • •." 79 Cong. Rec. 533. The bill was reported out favorably by the Committee on World War Veterans Administration on January 23, 1935. 79 Cong. Rec. 859; H. Rep. No. 16, 74th Cong., 1st sess. It passed the House on June 3, 1935, with no discussion concerning the problem now here. 79 Cong. Rec. 8557. It was then reported by the Senate Finance Committee (S. Rep. 1072, 74th Cong.,

That this was the very purpose of the 1935 amendment is also manifested by this Court's opinion in *Lawrence* v. *Shaw*, 300 U. S. 245, 249:

> The World War Veterans' Act, 1924, provided that the compensation and insurance allowances should be "exempt from all taxation." The Act of 1935 is more specific, providing that the payments shall be exempt from taxation and shall not be liable to process "either before or after receipt by the beneficiary."

See *Carrier* v. *Bryant*, 306 U. S. 545, 547; *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57; *Tompkins* v. *Tompkins*, 132 N. J. L. 217, 38 A. 2d 890. We submit that the terms of the 1935 Act, coupled with judicial and congressional recognition of its purpose, completely undermine appellee's contention that the federal statutory immunity ceases upon payment of the insurance proceeds to the designated beneficiary.[21] At the same time those con-

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1st sess; 79 Cong. Rec. 10997), and passed the Senate on July 29, 1935. 79 Cong. Rec. 11997. The President approved the bill and it became Public Law 262, on August 12, 1935. 79 Cong. Rec. 13992.

[21] This conclusion is in no way weakened by *Gaskins* v. *Security-First National Bank*, 30 Cal. App. 2d 409, relied on by appellee at page 7 of her Statement Opposing Jurisdiction and Motion to Dismiss or Affirm. That case, and similar cases cited by appellee (*e.g.*, *In re Flanagan*, 31 F. Supp. 402 (D.D.C.); *Schlaefer* v. *Schlaefer*, 112 F. 2d 177, 185 (C.A. D.C.)), aside from the fact that they cannot be readily reconciled with the express language of the 1935 Act, simply indicate that the statutory exemption of payments made to a veteran may not be invoked by the veteran himself to avoid his legal obligation to support his wife and children. These "support" cases clearly have no application to the

siderations furnish a conclusive answer to the argument that judgments, including those based on community property laws, may be satisfied out of N.S.L.I. proceeds themselves while they are in the beneficiary's hands.

B. *The immunity conferred by the 1935 Act, exempting N.S.L.I. proceeds from judicial process while they are in the hands of the beneficiary, does not violate the Due Process Clause of the Fifth Amendment*

Appellee contends that a failure to allow her to satisfy her community property claim out of N.S.L.I. proceeds in the hands of the designated bene-

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instant case. Here there is no claim of lack of support or of a failure by the husband to make other adequate provisions for his wife. Nor does the widow allege that she is dependent in any way on the N.S.L.I. insurance proceeds for her support. The court below, in fact, noted that the widow would be entitled to her community property share "without regard" to the amount or condition of the estate remaining in the husband's hands at the time of his death (R. 24). In addition, the "support" cases involved attempts by the beneficiary of the payment, *i.e.*, the husband, to set up an exemption statute to avoid a legal obligation owing *by him* to his wife or children. Certainly no analogous situation exists here where the beneficiary of the insurance payments is not the veteran-husband, nor even his estate, but a third party, properly designated under the federal statute, who is under no obligation to the wife.

Equally lacking in merit is appellee's claim that the 1935 Act protects the insurance payments from only the claims of "creditors" (Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, p. 11). The broad terms of the 1935 Act make it obvious that it is not so limited and that it was intended to immunize the payments against any sort of judicial process whatever. The "language [of the 1935 Act] is about as broad as language could be found in a statute extending the privilege of exemption." *In re Houching*, 17 F. Supp. 556, 558 (S.D. W. Va.).

ficiary would contravene Article V of the Constitution by depriving her of her vested community property rights. The court below accepted this argument and concluded (R. 25):

> that, in view of the Fifth Amendment, the federal government had no power to provide, as it is contended it did in section 454a, *supra*, [the 1935Act] that payments made to a beneficiary of a national service life insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary.

This argument is specious. First, it ignores the fact that the 1940 Act—which incorporated the 1935 statute—was on the books before appellee's husband purchased his N.S.L.I. policy, and long before any of her rights could have "vested", even under California law. Secondly, it ignores the basic principle that Congress is not prohibited by the Due Process clause from interfering with private rights, even if they exist and have actually vested, so long as the action taken falls within some paramount federal power and has reasonable warrant in the circumstances.

1. When it was passed in 1940, the N.S.L.I. Act expressly provided, through the incorporation of the 1935 statute, that proceeds of N.S.L.I. policies would "not be liable to attachment, levy, or seizure

by or under any legal or equitable process whatever, either before or after receipt by the beneficiary" (*supra*, pp. 44-45). Moreover, the 1940 Act also specifically provided (in Section 602(i)) that "no person shall have a vested right" to the proceeds of a N.S.L.I. policy. See *supra*, p. 27; *infra*, p. 58.

Regulations early issued by the Administrator of the Veterans Administration, in accordance with the authority conferred upon him by the Act, paraphrase and implement the latter statutory provision by prescribing that "no person shall have a vested right to any installment" and "no installment * * * shall be paid to the heirs, creditors, or legal representatives * * * of the insured or of any beneficiary." (6 F.R. 1162; 38 C.F.R., Section 10.3449, 1941 Supp.). And, as we have shown (*supra*, pp. 34-35; *infra*, pp. 60-71), the Veterans Administration has also held, from the very beginning of the administration of the National Service Life Insurance system, that wives of soldier-husbands residing in community property states have no interest in N.S.L.I. policies or proceeds.

Major Wissner's purchase of a N.S.L.I. policy, in 1942, was made pursuant to these pre-existing provisions of the statutes and regulations. Accordingly, whatever rights appellee secured in the policy or its proceeds were likewise secured subject to these pre-existing provisions, and it was impossible for her interest or rights to "vest" in any sense which made them superior to the statutory rules which were already on the books when her

husband entered the army and took out his policy. This is made even clearer by the fact that under the California law, the "vesting" of a community property interest in insurance proceeds occurs at maturity of the policy. *Supra*, pp. 18, 25-26, 27. Since the policy in the instant case matured in 1945 (R. 13), it is plain that the rights claimed by appellee under the state law arose several years *after* the enactment of the 1940 and 1935 Acts, and, therefore, could not have been improperly "divested" by either of those Acts.

2. In any event, it has always been recognized that the destruction of a valuable economic right or relationship does not in itself render a statute invalid on substantive due process grounds. *West Coast Hotel* v. *Parrish*, 300 U. S. 379, 391; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Pennsylvania Coal* v. *Mahon*, 260 U. S. 393, 413. And, where Congress in the exercise of an admittedly granted power has adopted a means reasonably adapted to achieve a legitimate end, such legislation has withstood constitutional challenge even though the effect is to set aside vested rights. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240; *Calhoun* v. *Massie*, 253 U. S. 170; *Wright* v. *Union Central Insurance Co.*, 304 U. S. 502; *Hamilton* v. *Kentucky Distilleries Warehouse Co.*, 251 U. S. 146; *Lynch* v. *United States*, 292 U. S. 570, 579.

Directly in point is this Court's decision in *Ruddy* v. *Rossi*, 248 U. S. 104. That case involved

the applicability of the exemption provision of Section 4 of the Homestead Act which provided:

> No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

Before the patent from the United States for this land was issued, but after the homesteader had completed final entry on the land, and thus had become legally entitled to the land, he contracted the debt sued upon. A judgment on that debt was obtained against the landowner after patent issuance. Execution was issued and levied on the homestead. The lower court held that the land was liable on execution for the debt contracted between final entry and patent issuance, since the homesteader was legally entitled to the land at the time of final entry. This Court reversed, holding that the clear language of Section 4 must be applied. The issue there involved was posed by the Court as follows (248 U. S. 104, 106):

> Did Congress have power to restrict alienation of homestead lands after conveyance by the United States in fee simple? * * *
>
> The Constitution declares "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; and it is settled that Congress has plenary power to dispose of public lands. *United States* v. *Gratiot*, 14 Pet. 526, 537. They may be leased, sold or given away upon

such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness.

"The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

Acting within its discretion, Congress determined that in order promptly to dispose of public lands and bring about their permanent occupation and development it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the legislature owed to the public.

Since the national defense and war powers of Congress—under which the N.S.L.I. system was established—are at least as broad as its power to dispose of land, this Court's opinion in the *Ruddy*

case fully sustains the power of Congress to provide, as it did in the 1935 and 1940 Acts, that statutory immunity should attach to veterans' insurance payments after their receipt by the beneficiary as well as before, even as against a "vested" claim. It was entirely reasonable for Congress to desire that beneficiaries of a N.S.L.I. policy should be permitted to keep the insurance proceeds as against the whole world, and it was not an undue interference with the rights of creditors and claimants to provide that they cannot look to those proceeds for satisfaction of their demands.

With particular reference to the 1935 Act, this Court has made it clear that the "before or after receipt" clause of the statute must be construed as protecting veterans' payments at least up until the time when those payments are expended or invested in other property. *Lawrence* v. *Shaw*, 300 U. S. 245, 251. The Court held in that case that the statutory exemption protects payment not only after their receipt by the beneficiary, not only while they are in his hands, but also while they are on deposit in his checking account. Failure to extend this protection, where the payments have been neither expended nor invested by the beneficiary, would, the Court observed, frustrate "the intent of the statute." 300 U. S. 245, 250-251.

The *Shaw* case does not discuss the constitutionality of the exemption statute. It assumes it. See *Culp* v. *Webster*, 25 Cal. App. (Sup.) 2d 759. No federal court, nor any state court, heretofore,

has cast any doubts on the Act's constitutionality.[22] The court below stands alone in challenging the validity of the enactment; its challenge must be contrasted with the recent opinion of another California District Court of Appeal in *Kauffman* v. *Kauffman*, 93 Adv. Cal. App. 966, 972:

> The provision in section 454a [the 1935 Act] that the payments and benefits due or to become due are exempt from taxation and the claims of creditors, and are not subject to legal or equitable process indicates that Congress intended to control the title to such payments and benefits both before and after payment. This control and the provisions of the section have been recognized and enforced. (*Barton* v. *United States*, 75 F. Supp. 703, 705; *Carrier* v. *Bryant*, 306 U. S. 545, 548 [59 S. Ct. 707, 83 L. Ed. 976].)

See also *Culp* v. *Webster*, 25 Cal. App. (Sup.) 2d 759.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is erroneous and should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

DECEMBER, 1949.

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[22] See *Williams* v. *United States Fidelity & Guaranty Co.*, 107 F. 2d 210 (C.A. D.C.); *Bradley* v. *United States*, 143 F. 2d 573; (C.A. 10), certiorari denied, 323 U. S. 793. *Tompkins* v. *Tompkins*, 132 N. J. L. 217; *Purvis* v. *Walls*, 184 Ark. 887; *City of Atlanta* v. *Stokes*, 175 Ga. 201; *Speer* v. *Pierce*, 18 Tenn. App. 351.

APPENDIX A

STATUTES INVOLVED

1. Section 602 (g), (h), (i), (j), (k), 608 and 616 of the National Service Life Insurance Act of 1940 (Act of October 8, 1940, 54 Stat. 974, 1009, as amended by the Act of September 30, 1944, 58 Stat. 762),[23] 38 U.S.C. 802, 808 and 816, provide:

> SEC. 602 (g). The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.
>
> (h) Such insurance shall be payable in the following manner:
>
> (1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments: *Pro-*

[23] The amendatory Act of August 1, 1946, 60 Stat. 781, added several provisos, most of which affect only those policies maturing on or after August 1, 1946. Since the policy in the instant case matured on November 14, 1945 (R. 13), the amendatory provisos have not been set forth above.

vided, That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect in lieu of this mode of payment, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: *Provided further*, That such optional settlement shall not be available in any case in which payments of insurance installments have been commenced prior to [September 30, 1944].

(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary: *Provided*, That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the

face value of the contract less any indebtedness with such payments continuing throughout the lifetime of such beneficiary: *Provided further*, That such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months, nor in any case in which payments of insurance installments have been commenced prior to [September 30, 1944].

(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—

(A) to the widow or widower of the insured, if living;

(B) if no widow or widower, to the child or children of the insured, if living, in equal shares;

(C) if no widow, widower, or child, to the parent or parents of the insured, if living, in equal shares;

(D) if no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares.

(i) If no beneficiary is designated by the insured or if the designated beneficiary does

not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordance with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h).

(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, except that if the reserve of a contract of converted national service life insurance, together with the dividends accumulated thereon, less any indebtedness under such contract, exceeds the aggregate amount paid to the beneficiaries, the excess shall be paid to the estate of the insured unless the estate of the insured would escheat under the laws of his place of residence, in which event no payment shall be made.

(k) When the amount of an individual monthly payment is less than $5, such amount

may, in the discretion of the Administrator, be allowed to accumulate without interest and be disbursed annually.

SEC. 608. The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this part, shall have power to make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this part as may be assigned to them by the Administrator. All official acts performed by such officers or employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. Except in the event of suit as provided in section 617 hereof, all decisions rendered by the Administrator under the provisions of this part, or regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by motion or otherwise any such decision.

SEC. 616. The provisions of Public Law Numbered 262, Seventy-fourth Congress, approved August 12, 1935 (49 Stat. 607), and titles II and III of Public Law Numbered 844, Seventy-fourth Congress, approved June 29, 1936 (49 Stat. 2031), insofar as they are

applicable, shall apply to the provisions of this part.

2. The Act of August 12, 1935, 49 Stat. 607, 38 U.S.C. 454a, incorporated by reference into Section 616, *supra*, provides in pertinent part:

> Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary * * *.

APPENDIX B

LETTER FROM THE VETERANS ADMINISTRATION

VETERANS ADMINISTRATION
Washington 25, D. C.

Nov. 16, 1949.

Office of
Solicitor
Mr. H. G. Morison
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Your File Reference:
In Reply Refer To: 2BR

Re: WISSNER, Leonard O., XC-6 035 603

DEAR MR. MORISON:

This refers to your request to be advised whether a claim for National Service Life Insurance bene-

fits by or on behalf of Margaret V. Wissner, surviving widow of the deceased insured, Leonard O. Wissner, has been filed in the Veterans Administration and, if so, what action has been taken thereon.

The official records of the Veterans Administration pertaining to National Service Life Insurance in this case reflect that Leonard O. Wissner applied for National Service Life Insurance in the principal sum of $10,000 on January 25, 1943, designating as principal beneficiary therefor his mother, Mrs. Louise Wissner, and as contingent beneficiary his father, Leandous H. Wissner. The insurance was in full force and effect when the insured died on November 14, 1945. Pursuant to the principal beneficiary's claim therefor, an award of insurance benefits at the rate of $76.70 per month was approved January 13, 1946, in favor of Louise M. Wissner and the award is presently in course of payment. Prior to the approval of said award a claim on behalf of Margaret V. Wissner was filed in the Veterans Administration on December 31, 1945 in the form of a letter dated December 26, 1945 from Cleary and Zeff, attorneys of Modesto, California; and said claim was denied as indicated in a letter from the Chief, Life Insurance Claims Division to Messrs. Cleary and Zeff, dated January 19, 1946. Copies of the above mentioned letters are attached hereto for your information.

Reference is also made to your request to be advised concerning the administrative practice of the Veterans Administration with particular reference to the question whether the proceeds of Na-

tional Service Life Insurance payable to a beneficiary within the restricted permitted class other than the widow of the insured, are regarded as community property if the marital domicile of the insured and his wife was in a community property state. As to this question, it is necessary to inform you that the Veterans Administration has consistently held that National Service Life Insurance maturing prior to August 1, 1946, the date of enactment of Public Law 589, 79th Congress, 60 Stat. 781, et seq., amending the National Service Life Insurance Act of 1940, is to be paid according to the specific provisions of the controlling federal statute and does not constitute community property under any state law. Moreover, as to yearly renewable term insurance issued under the War Risk Insurance Act, as amended, and the World War Veterans' Act, as amended, the Veterans Administration, as well as its predecessor agencies, the Bureau of War Risk Insurance and the Veterans Bureau, has uniformly held that such insurance does not constitute community property and that state community property laws have no applicability except possibly where the insurance is payable to the estate of a deceased person and after payment is subject, in its further distribution through the estate, to local statutes. This practice has been followed consistently since at least as early as 1920, when the General Counsel of the Bureau of War Risk Insurance approved the same. Many expressions in subsequent opinions of the General Counsel and the Solicitor are to the same effect, typical of them being a ruling which I made in an individual case on August 23, 1945, in a letter addressed to United States Senator

Warren G. Magnuson, a copy of which is attached hereto.

Very truly yours,

(S.) EDWARD E. ODOM,
Solicitor.

Encls:

Copy of letr. to Sen. W. G. Magnuson,
Copy of letr. fr. Cleary & Zeff, Attorneys,
Copy of letr. fr. Ch., Life Ins. Clms. Div. to Cleary & Zeff, Attys.

Copy

Enclosure No. 1

Copy of letter to Senator Magnuson

August 23, 1945.

Honorable Warren G. Magnuson,
United States Senate,
Washington, D. C.

Re: MOORE, Wm. G.
XC-3 776 399

MY DEAR SENATOR MAGNUSON:

Further reference is made to your letter of July 30, 1945, transmitting an inquiry addressed to you by Mr. Cal Butterworth, 300 East Pine Street, Seattle, Washington, concerning the disposition of the National Service Life Insurance of the veteran named in the caption. Your constituent's letter is returned at this time, a copy having been made for the files. It is noted that you request any comments as to the correctness of Mr. Butterworth's position, namely that the National Service Life Insurance should be regarded as community property and therefore should be subject to the

State statutes of Washington with reference thereto.

The insured in this case gave his home address as Centralia, Washington; made application on March 16, 1944, for $10,000 National Service Life Insurance and designated as his principal beneficiary his mother, Edith Ivy Froberg. An award of the National Service Life Insurance has been made and approved in favor of the designated beneficiary of record, namely the insured's mother. There is evidence that the insured was survived by a widow and by two children, the marriage having taken place in the State of Oregon in 1935. The widow, Mrs. Vivian F. Moore, also of Centralia, Washington, in the opinion of your constituent is entitled to a share of the National Service Life Insurance although she was not the designated beneficiary, but because of the provisions of the State statutes as to community property.

Your constituent refers to the case of the Occidental Life Insurance Company vs. Powers, 192 Wash. 475; 74 Pac. (2d) 27, and to another case of the same tenor, King vs. Prudential Insurance Company, 13 Wash. (2d) 414, 125 Pac. (2d) 282. In the Occidental Life Insurance case and in the other case cited, commercial insurance only was involved and the court in those two cases held that the commercial insurance was to be regarded as community property.

The situation with reference to insurance issued by the United States Government upon the lives of servicemen under the War Risk Insurance Act 1917, as amended, the World War Veterans Act 1924 as amended and the National Service Life

Insurance Act 1940 as amended presents a different situation from that developed by a policy of commercial life insurance. The Bureau of War Risk Insurance and its successors, the Veterans Bureau, and the Veterans Administration in dealing with yearly renewable term insurance issued under the War Risk Insurance Act as amended, and the World War Veterans Act 1924 as amended has uniformly held that such insurance which came to being by virtue of the Federal Statutes does not constitute community property except possibly where in the distribution of that insurance after the death of a designated beneficiary or distributee before the contract had been fully paid, the remaining installments or the present value thereof might pass to the insured's estate pursuant to the statutes as amended. In such a contingency and in such a contingency only, where payment was to be made to the insured's estate has the Veterans Administration held, if the insured was a resident of a State recognizing the community property theory that such remaining insurance once paid to the estate then became subject in its further distribution to the local statutes so that in a jurisdiction applying the community property rule, the insurance might so be regarded.

With reference to the National Service Life Insurance here involved there is not only a limited class of beneficiaries (Section 602(g), Public 801, 76th Congress as amended) but the statute also provides that the insured shall at all times have the right to change the beneficiary or beneficiaries without the latter's consent, but only within the classes provided, that is, widow, widower, child, including

a stepchild or illegitimate child if designated, parent, brother or sister.

Further, the National Service Life Insurance Act also provides in Section 602(i) that the right of any beneficiary to payment of any installments is conditioned upon his or her being alive to receive such payments and that no person shall have a vested right to any installment or installments of such insurance and any installment not paid to a beneficiary during the beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled. The same Act (subsection 602(j)) provides that no installments of such insurance shall be paid to the heirs or legal representatives of the insured or of any beneficiary.

It seems to this Office that under the terms of the Federal Statute creating National Service Life Insurance, such insurance was not intended to be community property and is not so to be classified; the insured at all times has the right to change the beneficiary within the classes permitted, without the consent of the prior beneficiary and no beneficiary has a vested right in said National Service Life Insurance. Further, as pointed out the National Service Life Insurance does not become a part of the estate of the insured or of any beneficiary.

May I ask your attention to the fact that the National Service Life Insurance Act, the basic statute here involved, was an exercise of Congressional power in connection with the National Defense and therefore would be the paramount law of the land. The United States Supreme Court in Hines *v.* Lowrey, 305 U. S. 85, 83 Law Ed. 56 considered Section 500 of the World War Veterans Act (dealing with the statutory limitation upon attorney's fees

of $10.00) and held that a State court was precluded from allowing a greater sum than that to an attorney retained by the committee of an insane veteran to prosecute the latter's claim under a War Risk Insurance contract. The court said:

> "Congressional enactments in pursuance of constitutional authority are the supreme law of the land. Section 500 is a valid exercise of congressional power. 'The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are.'"

There is a further distinction between National Service Life Insurance and the commercial policies involved in the cases supra. Both are contracts, to be sure, but the benefits of the Government policies are not paid for in full by the insured—instead the Government assumes the cost due to the War hazard and that of administration. As said by the late Justice Holmes for the Court in White *vs.* U. S. 270 U. S. 175; 70 Law Ed. 530:

> "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the government at considerable cost to itself, for the soldier's good."

It seems clear that this is a valid exercise of governmental power under the Constitution and to the

extent that the Federal legislation occupies this field, State powers must yield.

A copy of this letter is enclosed.

Very truly yours,

(s) EDWARD E. ODOM,
Solicitor.

JW By:aph

Copy

Enclosure No. 2

Copy of letter from Cleary and Zeff

Law Offices of
CLEARY AND ZEFF
Leslie A. Cleary, William Zeff
Court House, Suite 409 Telephone 1381
Modesto, California

December 26, 1945.

XC-6 035 603

Veterans Administration,
Division of Insurance,
Washington 25, D. C.

GENTLEMEN:

Re: Major Leonard O. Wissner, M.C. O-501799

I am writing you on behalf of Margaret V. Wissner, surviving widow of the above named member of the United States army.

Mrs. Wissner was advised by the authorities that her husband, Major Wissner, died in Burma in an army hospital on November 11, 1945.

We do not have the major's government insurance policy in our possession, but it is our desire to make claim to any moneys due under the same on behalf of the widow.

It is possible that Major Wissner may have named someone else as beneficiary under this policy, but inasmuch as the major was a resident of the State of California and all of his earnings were community property, the widow's community interest in the policy could not be given away by him simply by naming someone else as beneficiary.

We call this situation to your attention as we will ask you to protect the interest of the widow in making any settlement under any policy of government insurance which Major Wissner may have had at the time of his death.

Should there be any question relative to the law of this state concerning the interest of the widow in a policy of insurance paid for with community funds, regardless of who may be named beneficiary, we will be pleased to furnish you with the necessary legal authorities upon request.

Should there be any forms that are to be completed and executed by Major Wissner's widow in support of her claim, please advise us and forward such forms to us.

Very truly yours,

CLEARY AND ZEFF,
By (s) Leslie A. Cleary.

LAC:BT

Copy

Enclosure No. 3

Copy of letter to Cleary and Zeff

January 19, 1946.

FCDA

Wissner, Leonard O., XC6 035 603

Messrs. Cleary and Zeff
Attorneys At Law,
Court House Suite 409,
Modesto, California.

Attention: Leslie A. Cleary

DEAR SIR:

Receipt is acknowledged of your letter dated December 26, 1945, making inquiry relative to the National Service Life Insurance of the above-named serviceman.

You are advised that the granting of National Service Life Insurance to servicemen is governed by an act of Congress, known as the National Service Life Insurance Act of 1940, as amended, (Public Law 801—76th Congress), which supersedes any existing law of any state of the United States with respect thereto.

The National Service Life Insurance Act provides that the insured may designate any person or persons within the permitted class of beneficiaries: Widow or widower, child, (including adopted child, step-child or illegitimate child), parent, (including parent through adoption and persons who stood in

the place of a parent to the insured), and brother or sister, (including those of the half blood), as beneficiaries of his insurance.

In view of the foregoing, the insured has a right to designate any beneficiary or beneficiaries of his insurance, and such designation is made by the insured over his signature and filed in this office.

Accordingly, the above-named serviceman has designated Louise Wissner, mother, as the principal beneficiary of his insurance and Leandus H. Wissner, father, as the contingent beneficiary for the full amount of insurance.

It is, therefore, evident from the above that the designation of the insured's mother as the principal beneficiary of his insurance was not made by him in violation of any law in existence in the State of California with respect to community property, and that Margaret V. Wissner, the widow of the serviceman, has no present interest in this insurance.

Very truly yours,

F. B. SIMMS,
Chief, Life Insurance Claims Division.

SS:mc

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee

AMICUS CURIAE BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, IDAHO AND NEVADA IN SUPPORT OF PETITION FOR REHEARING.

FRED N. HOWSER,
Attorney General of the State of California.
WALTER L. BOWERS,
Assistant Attorney General of the State of California.
DAN KAUFMANN,
Deputy Attorney General of the State of California,
600 State Building,
Los Angeles 12, California.
ROBERT E. SMYLIE,
Attorney General of the State of Idaho,
Boise, Idaho.
ALAN BIBLE,
Attorney General of the State of Nevada,
Carson City, Nevada.

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AMICUS CURIAE BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, IDAHO AND NEVADA IN SUPPORT OF PETITION FOR REHEARING.

Come now the Attorneys General of the States of California, Nevada and Idaho, and pursuant to leave of the Court, file this brief as Amicus Curiae, strongly yet respectfully urging this Court to reconsider its opinion rendered in the case of *Wissner* v. *Wissner*, dated February 6, 1950, No. 119, October Term, 1949, and to grant the Petition for Rehearing heretofore filed in said Court on behalf of the Appellee, Margaret Wissner. In so doing said Attorneys General are acting in behalf of the people of their respective states, to whose interest and social welfare the present cause is of vital concern.

Basis of Request for Rehearing

The issues in the case were framed by the following language contained in the opening paragraph of the opinion of majority of the court:

> "We are to determine whether the California community property law, as applied in this case, conflicts with certain provisions of the National Service Life Insurance Act of 1940; and if so, whether the federal law is consistent with the Fifth Amendment to the Constitution of the United States."

After framing the issues in this fashion, the Court held that a properly designated beneficiary of a National Service Life Insurance policy who is not the spouse of the insured is nevertheless entitled to all of the proceeds of the policy upon the death of the insured against any claim thereto of the surviving spouse, despite the fact that the marriage was in existence at the time the policy was acquired, that both spouses were domiciled in the community property state of California at all times, and that the premiums on said policy were paid from the army pay of the insured.

The majority of the Court based their conclusion upon the ground that it resulted from a proper interpretation of the provisions of the National Service Life Insurance Act[1] which permitted the insured to designate or change the beneficiary or beneficiaries of the insurance,[2] which exempted payments made to the named beneficiary from the claims of creditors and rendered them immune from attachment, levy or seizure,[3] and which stated that no person shall have a vested right to the proceeds.[4] After reaching this con-

[1] 54 Stat. 1008, as amended, 38 U.S.C.A. para. 801ff.

[2] 38 U.S.C.A. para. 802(g).

[3] 38 U.S.C.A. para. 816.

[4] 38 U.S.C.A. 802(i).

clusion, the majority of the Court also concluded that such an interpretation did not render the act unconstitutional since its object fell within the congressional powers over national defense.

We have given as careful consideration as possible to the opinions of the Court, both the majority and minority, and the premises upon which they are based, in the short period of time allotted to us for the filing of this brief. In support of the petition for rehearing we hereby submit the following contentions:

(1) There is neither necessity nor reason to hold or imply that the California community property law as applied in this case conflicts with certain provisions of the National Service Life Insurance Act of 1940, when the underlying basis of the California community property system is given proper consideration;

(2) We feel that this Court has not appreciated the full import of its decision in this case as it affects hundreds of thousands of soldier-citizens domiciled in community property states and millions of dollars invested by these soldier-citizens in National Service Life Insurance policies;

(3) We feel that the Court's decision creates doubt and uncertainty concerning the status of millions of dollars of assets in community property states, not only because of the implied holding that the community property law of California is in conflict with the National Service Life Insurance Act, but also because of the footnote appearing in the majority's opinion which by implication may be construed to mean that army pay achieved by a married person domiciled in a community property state may not be community property.

We feel certain that the Court will overlook the inadequacy of our presentation of the points which we shall make in support of our contentions because of the handicap

of limited time under which we labor, time which has been shortened even more by the period required to be set aside to insure the timely filing of this brief. We also have confidence that this Court in a spirit of fairness to the many soldier-citizens domiciled in community property states will carefully consider these contentions in the light of the supporting points and will conclude that a more favorable opportunity should be given to these states to support their position.

Community Property Law Is Not Inconsistent With the National Service Life Insurance Act

There can be no question but that under the community property law as it exists in California ownership of community property is vested equally in both the husband and wife, although the control and management of said property, subject to certain exceptions are lodged in the husband.[5] (*Fernandez* v. *Wiener* (1945), 326 U. S. 340, 16 S. Ct. 178, 182-183; *Poe* v. *Seaborn* (1930), 282 U. S. 101, 51 S. Ct. 58). The Supreme Court of the United States has recognized this, the minority opinion in the instant case recognized this, and the majority opinion found no occasion to refute it. There can also be no question in view of the Supreme Court's holding in *Lynch* v. *United States* (1933), 292 U. S. 571, 54 S. Ct. 840, that a National Service Life Insurance policy is not a gratuity, but is a contract and as

[5] California Civil Code, Section 161(a).

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Section 172. "The husband has the management and control of the community personal property . . ."

Section 172a. "The husband has the management and control of community real property . . ."

such is property and creates vested rights. The majority opinion refuses to follow the logical approach that where the policy is concededly purchased with community funds, it is community property and each spouse has a one-half interest in the policy as an owner. It also refuses to accept the logical conclusion that the husband, though he has control and management, cannot give away more than what he owns, namely his half, and it is to be noted that the California courts follow this rule not only in the case of insurance policies, but also in the case of real property (*Dargie* v. *Patterson* (1917), 176 Cal. 714, 721, 169 Pac. 360; *Lehaney* v. *Lehaney* (1929), 208 Cal. 323, 328, 281 Pac. 67; *Britton* v. *Hammell* (1935), 4 Cal. 2d 690 (52 Pac. 2d 221) and other personal property (*Ballinger* v. *Ballinger* (1937), 9 Cal. 2d 330, 334, 70 Pac. 2d 629). The court feels compelled to avoid these conclusions upon the ground of statutory construction, but such a construction is neither reasonable nor necessary.

The majority states that the act permits the insured to select his beneficiary and he can do this without reference to the law of his domicile. But these words appear in insurance policies other than National Service policies, and, as was so ably pointed out by counsel for the appellee, and in the dissenting opinion there is no need to ascribe any greater significance to them in a contract which is between the federal government and the insured and one which is between a private company and the insured, and in the latter instance the majority concedes that the community property law is applicable.

But the all-important fact is that the community property law when applied to the facts of the instant case does not deprive the insured of the right to select his beneficiary and to insure that that beneficiary receive the proceeds of the policy which the insured has the power to dispose of. The insured has a half interest in the policy, he is a half

owner of the policy and as to that half interest Congress has permitted him to name the beneficiary to the exclusion of his spouse or anyone else. The California courts have always recognized that where the husband makes a gift of community property to a third person and dies, the gift is not void, but is valid as to his half interest. (*Dargie* v. *Patterson* (1917), 176 Cal. 714, 721, 169 Pac. 360; *Lahaney* v. *Lahaney* (1929), 208 Cal. 323, 328, 281 Pac. 67; *Britton* v. *Hammell* (1935), 4 Cal. 2d 690, 52 Pac. 2d 221; *Ballinger* v. *Ballinger* (1937), 9 Cal. 2d 330, 334, 70 Pac. 2d 629; *Grimm* v. *Grimm* (1945), 26 Cal. 2d 173, 175, 157 Pac. 2d 841.) This still leaves plenty of substance to the provision of the act permitting the insured to designate his beneficiary, for in the absence of such a provision and in the absence of the provision permitting the beneficiary to be selected from a broad group, the insured might be bound to accept his spouse or children as beneficiaries even as to the half of the proceeds which he owns.

The provision of the act stating that no person shall have a vested right to the proceeds of the policy likewise is in accordance with this view, for, in the case of a service policy which is community property and in which some person other than the spouse is designated as the beneficiary, such beneficiary takes the insured's interest in the policy as a beneficiary and therefore would have no vested right to it; but in the case of the sponse in such instance, her interest in the policy does not come to her as a beneficiary, but because under the doctrine of *Lynch* v. *United States* she is the owner of a one-half interest of property in the policy and has a vested right as to this one-half interest. The dissenting opinion written by Mr. Justice Minton clearly recognizes when he states, "The nature of this dispute is a claim by the wife that she is the owner of a half portion of these proceeds because such proceeds are the fruits

of funds orginally hers." And further, when he states, "Here the wife makes no claim to rights as a beneficiary."

This fundamental concept of community property likewise shows that the provision respecting immunity of the proceeds from creditors and from attachment, levy or seizure, has no significance under the facts of the case because it has never been held that the wife in a community property state occupies the position of a creditor with respect to community assets; she has always had an ownership interest, and it is that interest which is being asserted and not the interest of a creditor. We cannot help but agree completely in view of this fundamental concept of community property law with the language of Judge Minton: "I am not persuaded that either the choice of beneficiary or the exemption provision should carry the implication of wiping out family property rights, which traditionally have been defined by state law. Fully to respect the right which Congress gave the serviceman to designate his beneficiary does not require disrespect of settled family law and the incidents of family relationship."

Import of the Decision

In considering the constitutionality of the act the majority of the Court indicated that the purpose behind the act was the enhancing of the morale of the serviceman. The majority was obviously looking at the act from the viewpoint of the facts of the case before it, i.e., the case of an insured dying in the service of his country. Even under such facts the Court must consider that it was just as fundamental a purpose for Congress to provide a voluntary and comprehensive plan of insurance coverage so that the government would have a fund from which to assist the widows and children of deceased and disabled soldiers and thus keep them off the rolls of the government charity. When

viewed from this latter point of view, it is apparent that the Court has placed too much emphasis upon the fact that the Congress allowed the insured to select and change his beneficiary, particularly when it cannot be denied that the conditions of war in all too many instances placed an unbearable strain upon the marriage ties. It is inconceivable that the Congress intended under these conditions to wipe out the safeguards of the community property system and to say to the serviceman in the words of Judge Minton: " 'You may take your wife's property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money.' "

But counsel for the appellee in his petition for rehearing has called attention to the problem of National Life Insurance as investment insurance and the impact which this decision has upon the status of such policies dating back to World War I. There is no better proof that Congress intended such policies to be treated as other insurance policies than the fact that the Congress, the military units of the nation, and the Veterans Administration have placed the greatest emphasis on the fact that these policies are valuable assets. At the time of enlistment, at regular intervals during the service career, upon discharge from the service, and by advertisement and dissemination of information since, the serviceman and ex-serviceman has been encouraged, persuaded and induced to maintain his National Life Insurance Policy and convert it under any of the plans offered. The Congress has repeatedly extended the provisions of law permitting such insurance to be carried, long after the wars were over, and when the morale of the serviceman was no problem, for he had become an ordinary citizen again. More recently, dividends have been paid by the Veterans Administration upon such policies upon the basis of premiums paid. There can be little doubt in the face of these facts that the Congress was just as concerned

about the welfare of the soldier as a soldier-citizen and in providing a savings plan for him and his family as it was in enhancing his morale.

Time is too short at this step in the proceedings to permit the presentation of any statistics, but it is safe to say that thousands of citizen-soldiers in community property states have continued on their government insurance, either as term insurance or under a savings plan after conversion; and until the decision in the instant case, no question could have arisen but that such policies were community assets when paid with community funds. Here again, it is inconceivable that it was within the Congressional intent that such policies, which might perhaps represent the total community savings, might be applied for non-community purposes by the insured spouse with no remedy to the other member of the community and that thus the safeguards of the community system be totally wiped out.

The Decision Creates Doubt and Uncertainty as to the Status of Funds Received From the Federal Government by Soldier-Citizens of Community Property States.

As pointed out by counsel for the appellee in his petition for rehearing, it cannot be determined from the majority opinion whether it is holding that under the facts of the case the policy is separate property and therefore the wife has no interest in the proceeds, or whether it is holding that the policy and its proceeds are community property, but that Congress has immunized the policy and its proceeds against any claims of the wife. Inasmuch as the Second World War has been over for nearly five years, the factual situation presented by the instant case is not bound to recur, but the question is bound to occur and reoccur in cases of divorce or death of the insured who has converted his policy. The question may very well occur as a result of

the policy of payment of dividends instituted by the Congress and the Veterans Administration. The soldier-citizens in community property states are entitled to know the exact status of their investments arising out of National Service Life Insurance policies so that they and their spouses may be guided accordingly.

The decision renders uncertain the situation where the premiums upon return to civilian life are paid from non-military earnings, perhaps even by the earnings of the spouse who is not insured, because the insured spouse, being the husband, has control of the checking account. It does not seem possible that the majority opinion would be extended to remove the safeguards of the community property system in such an instance, yet the danger is there unless the Court indicates its awareness of this potential situation and the relation of the facts in the instant case to it.

Finally, there is the footnote of the majority opinion which states that "The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property." Apparently no contention was made by anyone that the funds used to pay for the premiums on the policy were not community property, and the trial court's finding that said funds were community property were without doubt based upon the general rule that all property acquired after marriage which is not acquired by gift, bequest, devise or descent, is community property. Why did the majority find it necessary to incorporate this footnote in view of the fact there was no issue in the case as to the nature of the funds? Is the Court implying that there is an open question as to whether or not army pay can be community property? Such a possibility would affect not only National Service Life Insurance policies but also all of the investments made by

returning servicemen in community property states from their service wages accumulated because of their thriftiness or because the geography of their military service precluded their spending any of their pay. The number of veterans who ventured into business with their accumulated service wages was extensive, and the total investment is large; it scarcely seems possible that the Court intended to even consider this question of such great importance by means of a footnote, and yet the footnote appears in the opinion and the inference can be drawn.

Conclusion

A very large segment of the population of these United States lives under the domain of the community property system. It is a practical system of husband and wife relationship and yet it is a salutary one. Now that the wars have ceased, the government insurance which originated with the wars is being continued for investment as well as safeguard in many instances in accordance with specific Congressional approval. By its decision the Supreme Court has seen fit to remove from these policies the safeguards of the community property system, and this despite the fact that the Congress was well aware of how many of the citizens of this country reside under such a system of property ownership. In the face of this, the Supreme Court has decided that while all other property including other insurance policies, may be held under the rules of community property, National Service Life Insurance policies may not be. It certainly seems that the states joined in this Amicus Curiae Brief, which have heretofore not appeared in this case, should be given a full and fair opportunity to present the case for their soldier-citizens, so that this Court before it has made its final decision in this case can feel that it has had the benefit of complete presenta-

tion by all interested parties on a decision of tremendous import.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California.
WALTER L. BOWERS,
Assistant Attorney General of the State of California.
DAN KAUFMANN,
Deputy Attorney General of the State of California.
ROBERT E. SMYLIE,
Attorney General of the State of Idaho.
ALAN BIBLE,
Attorney General of the State of Nevada.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 119

LOUISE M. WISSNER and LEANDOUS H. WISSNER,
Appellants

vs.

MARGARET WISSNER,
Appellee

BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING AFTER DECISION BY THE SUPREME COURT OF THE UNITED STATES

PRICE DANIEL
Attorney General of Texas

CHAS. D. MATHEWS
Executive Assistant Attorney General

MARIETTA MCGREGOR CREEL
Assistant Attorney General

HARVEY L. DAVIS
Of Counsel

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Statement

This brief is filed by the State of Texas in accordance with Rule 27 of this Court.

The purpose of this brief is to urge that a rehearing of this cause be granted and that the Court re-

consider the decision heretofore rendered herein in view of its effect on the community property laws of the State of Texas and the rights secured thereby.

Purpose and Scope of the Brief

The State of Texas does not consider it appropriate to take sides in litigations between parties on questions of the extent of property rights, if any, which are secured to said parties by the laws of another state. Where, however, the effect of a decision adjudicating such rights cannot fail to do violence to rights secured by the community property laws of this State, it becomes both proper and necessary for the State of Texas to take action to protect the rights of its citizens and to urge their recognition by this Court. We will accordingly direct this brief primarily to a consideration of those fundamental principles of Texas community property law and the rights declared and secured thereby which will be affected by the opinion of this Court.

Interest of the State of Texas

Since the opinion in this case is applicable to both War Risk Insurance of World War I and National Service Life Insurance of World War II, the property rights of a vast number of Texas citizens are jeopardized thereby. Furthermore, the orderly administration of justice under the laws of this State necessitates a determination of the nature of government insurance policies purchased from community funds so that it may be clear whether the choses in action evidenced thereby are community property or separate property. It is respectfully urged that

the decision heretofore rendered herein is irreconcilable with the fundamental principles of Texas community property law and cannot be logically followed by the courts of this State in the administration of the laws of this State; and that therefore it is essential that the decision be reconsidered.

Argument

I.

The Decision Heretofore Rendered Does Violence to Texas Community Property Laws in That It Permits a Husband Unlimited Management, Control and Disposition of the Wife's Interest in Community Estate.

Under Texas law, the husband may designate as beneficiary of insurance policies on his life any person who has an "insurable interest"[1] in his life. This is true although the policies were acquired during coverture with community funds; and at the husband's death the proceeds of a policy on his life *vest in the beneficiary named* in the policy. *Volunteer State Life Insurance Co. v. Hardin*, 145 Tex. 245, 197 S.W. (2d) 105 (1946). Under the Texas law the husband has this power of designation by virtue of his general power of management or control of the community.[2] *But the power, and consequently the rule above stated, is limited by the requirement that it must not be exercised in fraud of the rights of the wife.* The Texas Courts have consistently endeavored to require the husband to act as a fiduciary should

[1]The legal meaning of this phrase as established by decisions of the Texas courts is not material here.

[2]Speer, Law of Marital Rights in Texas, (3rd Ed.) p. 93.

act in the handling and disposition of the community property; and have accordingly held that whenever fraud enters the picture, the husband may not designate another as beneficiary of policies on his life with the intent and for the purpose of depriving the wife of her share in the community estate. Should he attempt to do so, the wife may receive relief from the wrongful act of the husband. *Moore v. California-Western States Life Insurance Co.*, 67 S.W. (2d) 932 (Tex. Civ. App. 1934);[3] *Aaron v. Aaron*, 173 S.W. (2d) 310 (Tex Civ. App. 1943).[4]

Where the husband uses community funds for the payment of premiums on a policy on his life with the fraudulent intent of depriving the wife of her share in the community, these cases clearly recognize the wife's property rights in the *fund* used for payment of premiums, the wrong done to her rights by the husband's fraudulent act, and allow recovery measured by a part or all of the *proceeds* of the policy.

It is clear that the wife, having a vested interest in the community funds used for payment of premiums, acquires by mutations[5] a vested interest in the *policy*

[3] (Error dismissed by the Supreme Court of Texas.)

[4] (Error refused by the Supreme Court of Texas for "want of merit.")

[5] *Furche v. Sailer*, 8 S.W. (2d) 334 (Tex. Civ. App. 1928); Speer, Law of Marital Rights in Texas, (3rd Ed.) p. 462, presents it thusly: "It is not necessary to cite authorities upon a proposition so fundamental. It was never contemplated that the community should be denied the right freely to sell or exchange its possessions, upon pain of changing the status of the property if such sales or exchanges were made. To what estate could it be transferred by such a process?"

and that a fraudulent intent to deprive the wife of her vested interest in the policy gives her the right to recover an amount at least equal to one-half the proceeds. We wish to stress that under the Texas view the wife does not and cannot acquire a vested interest in the proceeds (death benefits) as such, of even a non-governmental policy matured by death of the insured where a third person is properly named beneficiary. *Volunteer State Life Ins. Co. v. Hardin.*[6] The insured has the contractual right and power to designate the person of his choice as beneficiary and the insurer can safely rely upon such designation.[7] The insured has such right and power under the National Service Life Insurance Act and the Veterans Administrator can just as safely rely upon such designation. *But the opinion heretofore written in this case wipes out the wife's property rights in the funds (earnings) used for the payment of premiums and the consequent property rights in the policy and the right to recover one-half of the proceeds where the husband acts in fraud of the wife.*

We respectfully point out that all of these traditional and firmly settled rights are wiped out on the basis that such was the implied intent of Congress to prevent interference with the insurance fund and the free designation of the beneficiary by the service man. YET THESE TRADITIONAL COMMUNAL PROPERTY RIGHTS MAY BE FULLY RESPECTED WITHOUT SUCH INTERFERENCE. THIS IS DEMONSTRATED BY THE FACT THAT NON-GOVERNMENTAL INSURERS CAN SAFELY PAY THE DESIGNATED BENEFICIARY—FREELY DESIGNATED BY THE INSURED.

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[6]145 Tex. 245, 197 S.W. (2d) 105 (1946).

[7]Article 4736a, V.C.S. Appendix, p. 29.

We are not here concerned, nor would it be proper for us to be, with the existence of a fraudulent intent on the part of the husband in this particular case. However, in view of the fact that the decision in this case gives the husband an unqualified power of disposal of community funds for the payment of premiums on governmental insurance policies, it is necessarily contra to the Texas cases cited, necessarily irreconcilable with the fundamental principles of community property law on which they rest, and necessarily in derogation and denial of long established property rights of the wife in community funds.

A. Community Property Rights in Texas are Controlled by the Constitution.

Since by statute[1] in Texas the community estate is composed of "all property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other," any acquisition by either spouse during marriage becomes community unless it falls within the definition of separate property.[2] Separate property is limited to property acquired by gift, devise or descent and to the increase of separate lands. Speer, Law of Marital Rights in Texas, (3rd Ed.) 436. Thus all earnings during marriage,—salaries, wages and business profits *and any property acquired therewith*—are community property; and this is true whether the acquisition is accomplished by the husband or by the wife. The wife's rights of ownership in all property so acquired are in every respect equal to those of her husband. It has

[1]Article 4619, V.C.S. Appendix, p. 28.

[2]Article XVI, Section 15, Constitution of the State of Texas, defines the wife's separate property. Appendix, p. 30.

been said by this Honorable Court that these rights are identical, that the husband and wife own the estate in common, and that though the husband is the active managing partner of the union, yet her claims to the common property are equal to his.[10]

In the leading Texas case of *Arnold v. Leonard*,[11] two statutes which had the effect of declaring that the rents and revenues of the separate property of the wife would be her separate property, were held to violate the provisions of the Texas Constitution[12] defining the wife's separate property in that it was an attempt to enlarge the wife's separate property; that the Constitution gave rise to an implied prohibition against the legislative power either to add to or withdraw from the wife's separate property. This case has been cited and followed by many succeeding Texas cases for the principle that the legislature cannot enlarge upon the provisions of the State Constitution and make that separate property of the wife which otherwise would be community property. *Gohlman, L. & Co. v. Whittle*, 114 Tex. 548, 273 S.W. 808 (1925); *Frame v. Frame*, 120 Tex. 61, 36 S.W. (2d) 152 (1931).

There is no constitutional definition of the husband's separate property in Texas, and consequently, in *Stephens v. Stephens*,[13] a statute making rents and revenues from the husband's separate estate the

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[10] *Hopkins v. Bacon*, 282 U.S. 122 (1930).

[11] 114 Tex. 535, 273 S.W. 799 (1925).

[12] Article XVI, Section 15, Constitution of the State of Texas. Appendix, p. 30. The 1948 amendment provides for changes in the community estate if accomplished pursuant to the constitutional amendment.

[13] 292 S.W. 290 (Tex. Civ. App. 1927).

separate property of the husband was held to be constitutional. However, in *Commissioner v. Wilson,*[14] the Circuit Court of Appeals held that the said statute relating to rents and revenues from the husband's separate estate was unconstitutional. It was urged to the Circuit Court that since the State Constitution did not define the husband's separate estate, there was nothing to render ineffective its statutory extension. However, this Federal Court indicated that the whole course of legislation in Texas indicated a purpose to treat husband and wife alike in fixing their separate estates as against the community, and as the statutes were clearly connected with and dependent upon one another, since the provision as to the wife was unconstitutional, the provision as to the husband must also be so regarded.

It is urged that these cases clearly demonstrate that the community property system of Texas forms a pattern whereby constitutionally the property rights of the spouses are definitely fixed and cannot be enlarged or diminished by legislative or judicial processes. Yet the opinion heretofore written in this case permits the husband to completely destroy the wife's community property interest in funds used to pay premiums on National Service Life Insurance policies.

B. A Basic Principle of Texas Community Property System Is Limitation of Right of Husband to Manage, Control or Dispose of Wife's Interest in Community.

The majority opinion heretofore rendered in this case states that it will not attempt to epitomize a

[14]76 F. (2d) 766 (C.C.A. 5th Tex. 1935).

legal system at least as ancient as the customs of the Visigoths, in noting that the community property principle rests on more than the moral obligation of supporting spouse and children. However, it seems that this Honorable Court may not have considered certain additional principles inherent in our community property system whereby the wife secures certain vested rights.

Emphasis should be made of the vast difference between the civil law concept of marriage as a partnership and the common law concept of marriage as vesting in the husband all common property as well as making him the sole legal entity. Under the partnership concept, all property possessed by the husband and wife is presumed to be common property, owned equally by each, with the husband as the managing partner. This system, inextricably woven into the whole fabric of Texas life and law, has had no need of fundamental changes to adapt it to the present day requirements of husbands and wives. By contrast, it has been only by statutory enactments that married women in most common law jurisdictions have been permitted rights in their own property.

The sharp difference in the two basic concepts of ownership of property acquired after marriage is exemplified by *Willcox v. Penn Mutual Life Ins. Co.*, 357 Pa. 581, 55 A. (2d) 521 (1947), wherein the Supreme Court of Pennsylvania declared that State's Community Property Law of 1947 to be unconstitutional under both the Constitution of Pennsylvania and the Federal Constitution. The court there considered the statute passed in 1947, purporting to superimpose a community property system upon a state property structure where common law rules and principles

with respect to property held by and between husband and wife had been traditionally followed. The court received the benefit of profound research by many of the more prominent attorneys of Pennsylvania on the basic differences between the two marital property concepts. As a result they found that the newly enacted Community Property Law of 1947 made income and profits derived from property owned by a spouse prior to the effective date of the law, the common property of both spouses and that therefore its effect was to deprive the spouse of property without due process of law. The court was careful to note that the principles laid down by the Spanish law, and followed in the constitutions, statutes and judicial systems of some of the traditional community property states (including Texas) from the very beginning of their governmental existence, made such income and profits community property belonging to both spouses by halves.

The Pennsylvania Supreme Court also found that the said Community Property Law of 1947 failed to have any limitation on the management, control, and disposition of such community property by the husband and that therefore the wife was not really an owner of the property since she had none of the incidents of ownership. The court noted by contrast the limitations imposed by the traditional community property states (including Texas) upon the management, control and disposition of the community property by the husband.

This decision further emphasizes that the husband's administration of the community must be directed to the preservation and use of it for the common benefit of himself and his wife and may not be exercised to the latter's prejudice. The decision heretofore ren-

dered in this case permits the husband to administer community funds, in which the wife has a vested interest, to her prejudice by using such funds to pay premiums on National Service Life Insurance policies wherein some third party beneficiary may acquire complete rights in such proceeds "during life". It forecloses remedial relief where heretofore the courts have always granted such relief in favor of the wife for any violation of the husband's duties in regard to administration, control and disposition of the communal property. *Swisher v. Swisher*, 190 S.W. (2d) 382 (Tex. Civ. App. 1945).

C. The United States Supreme Court has Heretofore Recognized Limitation of Right of Husband to Manage, Control or Dispose of Wife's Interest in Community.

Respectfully called to the attention of this Honorable Court is the fact that heretofore this Court has clearly recognized the nature and the extent of the wife's vested property rights in the community property. In *Poe v. Seaborn*,[15] 282 U.S. 101 (1930), and

[15]Other Federal cases recognizing such rights include *Commissioner of Internal Revenue v. Fleming*, 155 F. (2d) 204 (Circ. Ct. of App., 5th Circ. 1946), wherein the court considered an appeal by the Commissioner from a decision of the tax court denying a claim of deficiency in a gift tax return of Fleming for 1938. Involved were two annuity contracts and two life insurance contracts on the life of Mrs. Fleming naming her daughter as beneficiary, with the usual reservation on the part of insured to change beneficiaries and the mode of settlement. The premiums for the insurance policies and the annuity were paid from community funds by checks drawn by Fleming on an account from which Mrs. Fleming also drew funds. The tax court found that the chief reason for taking out these contracts was Fleming's belief that the $40,000 face value life insurance policies would

companion cases (*Goodell v. Koch*, 282 U.S. 118, *Hopkins v. Bacon*, 282 U.S. 122, *Bender v. Pfaff*, 282 U.S. 127, and *United States v. Malcolm*, 282 U.S. 792) decided at the same time, it was held that according to the laws of the States with which those cases were respectively concerned, the wife had a vested property interest in the community property and not merely an expectancy. The case of *Hopkins v. Bacon*,[18] supra, dealt with the Texas community property laws, and this Honorable Court, in considering our statutes

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be exempt from the Federal estate tax and that he gave no thought to the powers granted the insured and that he did not intend to make a gift to Mrs. Fleming. Mrs. Fleming did not attempt to exercise any of the powers given her under the contracts. The Circuit Court held for Fleming on the basis that Texas decisions lay down the rule that property purchased during coverture with community funds is presumed to be community property though title be taken in the name of the wife alone. *Womack v. Womack*, 141 Tex. 299, 172 S.W. (2d) 307 (1943), was cited for the holding that a policy of insurance paid for with community funds was community property. See also *Joe J. Perkins v. Commissioner of Internal Revenue*, 1 Tax Ct. 982 (1943), which considered Texas cases of *Berdoll v. Berdoll*, 145 S.W. (2d) 227, (Tex. Civ. App. 1940, writ dismissed); *Locke v. Locke*, 143 S.W. (2d) 637 (Tex. Civ. App. 1940); and *Womack v. Womack*, supra, in connection with the gift tax to be levied on a policy of insurance on the life of the husband payable to his estate wherein all premiums were paid by community funds. The tax court held that the husband made a taxable gift of only one-half the value of the insurance policy, since the wife already owned a one-half interest in such policy. The tax court specifically stated that the result in *Blaffer v. Commissioner of Internal Revenue*, 103 F. (2d) 489 (writ denied 308 U.S. 559), which had construed Texas decisions as giving the wife no vested interest in policies paid for with community funds, should be reconsidered in view of the settled Texas law.

[18] 282 U.S. 122 (1930).

containing provisions as to what should be included in community property, stated at page 126 of the opinion:

> "They provide, as is usual in states having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799. Her interest is said to be equal to the husband's. Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200. It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other. Arnold v. Leonard, supra. These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. Stramler v. Coe, 15 Tex. 211; Martin v. Moran, 11 Tex. Civ. App. 509, 32 S.W. 904; Watson v. Harris, 61 Tex. Civ. App. 263, 130 S.W. 237; Davis v. Davis (Tex. Civ. App.) 186 S.W. 775."

The rationale of these cases decided by this Honorable Court, after profound research and submission of briefs and arguments by a large number of prominent attorneys from many parts of this nation, is that the wife has a vested interest in the community property because: "While the husband has the managment and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as co-owner." *Poe v. Seaborn,* 282 U.S. 101, 110 (1930).

THE TEXAS CONSTITUTION, STATUTES AND DECI-

SIONS IMPOSE LIMITATIONS ON THE HUSBAND'S MANAGEMENT, CONTROL AND DISPOSAL OF THE WIFE'S INTEREST IN THE COMMUNITY PROPERTY BUT THE EFFECT OF THE OPINION AS NOW WRITTEN IN THIS CASE WIPES OUT ALL SUCH LIMITATIONS HERETOFORE RECOGNIZED BY THIS HONORABLE COURT AND RELIED UPON BY THE CITIZENS OF TEXAS.

D. Summary of Community Property Principles as Applied in Texas Insurance Cases.

Following these principles of law heretofore discussed, the Texas courts have evolved, through numerous decisions,[11] definitive statements in the following situations of the rights of each spouse in the choses in action which are evidenced by a policy of insurance purchased from community funds:

1. Community Property Rights in the Cash Surrender Value of Insurance Policies Purchased During Marriage with Community Funds.

The Supreme Court of Texas has held that where insurance policies are obtained during marriage on the life of the husband or on the life of the wife and all premiums are paid from community funds, the cash surrender values of such policies constitute a part of the community estate. *Womack v. Womack,* 141 Tex. 299, 172 S.W. (2d) 307 (1943).[12] This holding

[11] An excellent and detailed discussion of "Community Property Laws As Applied to Life Insurance" by W. O. Huie, appears in 17 Texas Law Review 121, 18 Texas Law Review 121, and has been cited in numerous opinions of the Texas Courts.

[12] The following decisions of the Texas Courts of Civil Appeals hold that the cash surrender value of an insurance policy is property, and may be considered and treated as community

has recently been reaffirmed by our Supreme Court in *Volunteer State Life Insurance Co. v. Hardin*, 145 Tex. 245, 197 S.W. (2d) 105 (1946).[19]

2. Community Property Rights in the Proceeds of Insurance Policies Purchased during Marriage with Community Funds and Naming the Insured's Estate as Beneficiary.

The proceeds of a policy of insurance issued on the life of the husband during marriage, paid for from community funds and made payable to his estate are a part of the community estate and are one-half the property of the wife. Her one-half of the proceeds is therefore no part of the estate of the husband. *Mar-*

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property. *Shoemaker v. Harrington*, 30 S.W. 2d 539 (1930); *Locke v. Locke*, 143 S.W. 2d 637 (1940); *Berdoll v. Berdoll*, 145 S.W. 2d 227 (1940, error dism.). Federal recognition of these cases at pp.11-13 of this brief.

[19]The specific question before the court in this case involved the right of the husband after the death of his wife to dispose of the proceeds of policies of insurance on his life acquired during marriage with community funds. The son of the insured and his deceased wife sought to recover from the designated beneficiaries an amount equal to one-half of the cash surrender value of the policies at the time of his mother's death. Recovery was denied under the rule stated at the beginning of this argument, i.e., that in absence of an intent to defraud the wife the proceeds of a policy on the life of the husband vest in the beneficiary upon the death of the husband even though the policy was acquired during coverture with community funds. However, the court specifically pointed out that the right to the cash surrender value of the policies lapsed by the terms of the contract upon the death of the insured and that whatever rights, if any, the son had to share in the cash surrender value existed only against the father upon a partition of the community estate at his mother's death.

tin v. Moran, 32 S.W. 904 (Tex. Civ. App. 1895); *Lee v. Lee*, 112 Tex. 392, 247 S.W. 828 (1923); *State v. Jones*, 290 S.W. 244 (Tex. Civ. App. 1926, reversed on other grounds); *Jones v. State*, 5 S.W. (2d) 973 (Tex. Comm. App. 1928).

3. Community Property Rights in the Proceeds of Insurance Policies Purchased During Marriage with Community Funds and Naming as Beneficiary a Party Who Lacks an Insurable Interest.

Under Texas law if the beneficiary of a policy has no "insurable interest" the proceeds of the policy vest in the estate of the insured immediately upon his death, *Cheeves v. Anders*;[20] 24 Tex. Jur. 772, Insurance, Sec. 72; but, since under the rule stated in the second category above, only one-half of such proceeds can be deemed a part of the estate of the husband, the remaining one-half are the wife's share of the community estate.

4. Community Property Rights in the Proceeds of Life Insurance Policies Purchased During Marriage with Community Funds Naming as Beneficiary One Having an Insurable Interest.

a. In the absence of fraud.

By virtue of his power of management and control of the community,[21] the husband may use community funds to purchase a policy of insurance on his life and may validly designate as beneficiary thereof any person having an "insurable interest" provided such designation is not made with the fraudulent intent of

[20]87 Tex. 287, 28 S.W. 274 (1894).

[21]Discussed in this brief at pp. 3, 4, 7, 9-11.

depriving the wife of her share of the community estate. *Volunteer Life Insurance Co. v. Hardin*, 145 Tex. 245, 197 S.W. (2d) 105 (1946).

b. With the fraudulent intent to deprive the wife of her share of the community estate.

If the husband designates another as beneficiary of a policy on his life and pays the premiums from community funds with the fraudulent intent to deprive the wife of her share of the community estate, the wife may recover all or part of the proceeds. *Moore v. California-Western States Life Insurance Co.*, 67 S.W. (2d) 932 (Tex. Civ. App. 1934);[22] *Aaron v. Aaron*, 173 S.W. (2d) 310 (Tex. Civ. App. 1943).[23]

From the foregoing summary it is apparent that the Texas Courts have recognized and established the property rights of the respective spouses in the various choses in action evidenced by insurance policies on the life of one or both of the spouses. This recognition was inevitable under a community property system which is a system of *acquisitions and gains* during marriage. The basic concept of common ownership of property acquired during coverture necessitated a recognition of the property rights of the respective spouses in what "has become in our days one of the best recognized forms of investment and self-compelled savings.'"[24]

The decision in this case involves specifically only one of the situations in which the Texas wife's com-

[22]Error dismissed by the Supreme Court of Texas.

[23]Error refused by the Supreme Court of Texas for "want of merit."

[24]*Grigsby v. Russell*, 222 U.S. 149, 156 (1911).

munity property rights in a policy of insurance on her husband's life have been recognized. But it effectively destroys her right in this situation and allows the husband to use community funds to purchase government insurance policies on his life with the fraudulent intent and purpose of depriving the wife of her share of the community estate. In so doing it disregards and destroys property rights long secured to the wife under Texas law.

Moreover, any decision which gives the husband an unqualified power of disposal of community funds is so contra to the basic principles of our community property system that it potentially destroys all rights of the wife in any of the choses in action evidenced by a government insurance policy. This is so, since the basis of her right in any case lies in the fact that the policy was acquired during coverture with community funds.

II.

Various Provisions of Texas Law Require a Determination of Whether the Choses in Action Evidenced by Life Insurance Policies are Community or Separate Property of the Spouses.

A. Divorce.

Article 4638[25] directs a court pronouncing a decree of divorce to order a just division of the estate of the parties subject only to the limitation that the court may not compel either party to divest himself or herself of the title to real estate. The Supreme Court of Texas, in *Womack v. Womack*,[26] held that

[25] Appendix, p. 28.

[26] 141 Tex. 245, 197 S.W. 2d 105 (1946).

the cash surrender value of policies on the life of either spouse may properly be disposed of as community property on divorce if all premiums were paid from community funds.[27] Under this decision, in order to make proper division of the property of the spouses on divorce, it will be essential in many cases that Texas Courts know whether the cash surrender value of government insurance policies are the separate property of the insured spouse or a part of the community estate.[28]

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[27]Accord: *Shoemaker v. Harrington*, 30 S.W. 2d 539 (Tex. Civ. App. 1930); *Russell v. Russell*, 79 S.W. 2d 639 (Tex. Civ. App. 1934); *Locke v. Locke*, 143 S.W. 2d 637 (Tex. Civ. App., 1940); and *Berdoll v. Berdoll*, 145 S.W. 2d 222 (Tex. Civ. App., 1940, error dismissed by the Supreme Court of Texas).

[28]There is no such thing as "permanent alimony" in Texas, and it has been long settled in Texas that the husband cannot be compelled by the final decree of the court to support the divorced wife. *Cunningham v. Cunningham*, 120 Tex. 491, 40 S.W. 2d 46 (1931); *Pape v. Pape*, 13 Tex. Civ. App. 99, 35 S.W. 479 (1896, error dism.). The statutes provide only for temporary alimony to be paid pending the suit for divorce. Art. 4637, V.C.S. In an accounting upon partition of the community property, temporary alimony payments will be charged to the wife. *Hughes v. Hughes*, 259 S.W. 180 (Tex. Civ. App. 1924, error dism.). The majority opinion recognizes that some courts have held that the exemption provision of the National Service Life Insurance Act, 38 U.S.C. § 816, 38 U.S.C.A. § 816, and similar exemptions relating to pensions and veterans relief do not apply when alimony or the support of wife or children is in issue, but distinguished the "community property principle" as resting upon something more than the moral obligation of supporting spouse and children. It is submitted that the reasons for holding that such exemption provisions do not apply when the insurance proceeds are sought to be subjected to alimony and support for the wife apply with equal force to the wife's community interest in the policy, since the wife's means of permanent

B. Descent and Distribution.

Under Texas statutes of descent and distribution different provisions are made for the distribution of the separate property and of the community property in the event a spouse dies intestate.[29] It is sufficient for present purposes to point out that the amount of the distributive share is, in certain instances, dependent on whether the property was the separate or the community property of the decedent. Thus in these instances if the proceeds of a government insurance policy pass to the insured's estate, it is essential that the courts of this State know whether such proceeds are to be treated as community or separate property.

III.

Texas Citizens Should Know Whether Texas Is Entitled to Call Army Pay Community Property

We view with considerable concern the content of footnote number 2 to the opinion written in this case, wherein it is stated: "The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property." If California is not entitled to call army pay community property and if army pay was used to pay the total amount of all premiums on the policy involved, then under any view or system of law the wife could not prevail. The case could have been de-

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support after divorce will in many instances be derived from her share of the community property which is partitioned by the divorce decree.

[29]For the controlling statutes in this situation see Appendix, p. 27.

cided solely on this point—*if* California is not entitled to call army pay community property. But if this Honorable Court entertains doubt as to whether California is entitled to call army pay community property, then presumably the same doubt exists with respect as to whether Texas is entitled to call army pay community property. Research has failed to reveal any prior suggestion or expression of such doubt on the part of this Honorable Court or on the part of the Texas courts. The reason for the expression is not at all apparent. Traditionally, and by statute and court decision, the earnings or acquisitions by onerous title of both the husband and wife in Texas have been treated as community. *Hopkins v. Bacon*, 282 U.S. 122 (1930). See generally Speer, Law of Marital Rights (3d ed.), p. 441-3.

This expression may be based on footnote number 19, page 43, Brief for the United States as Amicus Curiae, to the effect that *army pay represents a gift by the government rather than earnings, because the government can compel any person to serve in its armed services without pay!* Such conclusion is specious since in fact our government did not and does not compel persons to serve in its armed services without pay. Any serviceman would probably receive in shocked disbelief any assertion that his army pay was a gift from his government.

Such assertion further is irreconcilable with the solicitude exhibited toward the serviceman by the government brief. It is probably unnecessary to state that it is also contrary to our constitutional concepts of freedom.

WE RESPECTFULLY URGE THIS HONORABLE COURT

TO REVISE THE OPINION SO AS TO REFLECT A DECISION AS TO WHETHER CALIFORNIA IS ENTITLED TO CALL ARMY PAY COMMUNITY PROPERTY SO THAT THE CITIZENS AND THE COURTS OF THE COMMUNITY PROPERTY STATES (INCLUDING TEXAS) MAY KNOW WHAT THE PROPERTY RIGHTS ARE IN SUCH CASES.

IV.

Conclusions and Summary of Argument

Simply stated, the opinion heretofore rendered is grounded on the proposition that a recognition of the wife's rights under the State law cannot be permitted in view of a congressional "mandate" that the proceeds of the policy must be paid in all cases to the beneficiary stated therein.

But is this the "mandate" of Congress?

In the government brief submitted herein, it was argued that the "main reason for foreclosing application of the California Community Property Law is the Supremacy Clause of the Constitution * * *" and that "wherever a conflict exists between a valid Federal Statute and a State Statute, the Supremary Clause requires 'the judges in every state' to be bound by the Federal law and to reject the State law."[20]

But wherein lies the conflict?

From what portions of the Federal Statutes can one logically derive evidence of congressional intent to destroy property rights secured to the wife by State law? Certainly not in the provision that the insured shall have the right to choose a beneficiary

[20]Brief for the United States as Amicus Curiae, p. 11.

from among a stated class. Certainly not in the provision that the insured shall have the right to change the beneficiary. Certainly not in the provision that the proceeds of the policy shall be paid to the party so designated. These are but the usual provisions in any contract of insurance. The remaining provision which is strongly relied upon is the exemption provision. But surely by this provision, Congress did not contemplate barring the rights of the wife to proceeds arising from a policy in which she has a vested property interest. There is no reason to assume a congressional intent to disregard and destroy property rights secured under State laws. We submit that the provisions of the Act itself do not warrant an inference of such intent. Under this view, there is no conflict between a Federal Statute and State Law. This court has previously recognized community property rights created under State laws as being consistent with Federal Statutes.

Let us re-examine, step by step, some of the arguments that were advanced to lead the court to this drastic interpretation of congressional intent.

First of all, as a premise, we have the postulate that "consistent administrative construction given government insurance legislation by the Veterans Administration 'is entitled to great weight, "and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." * * *'"[32]

We have heretofore shown that the construction of

[32]Brief for the United States as Amicus Curiae, page 35.

the Veterans Administration *is* clearly wrong in that it is in violation of community property rights established by state law and based on an unwarranted interpretation of congressional intent. As a basis for this drastic interpretation of congressional intent which results in a destruction of property rights long established under State Law we are told that the "need for uniform administration, required by the detailed provisions of the 1940 Act, would be frustrated in various ways if National Service Life Insurance proceeds were distributed in accordance with community property laws of the several states." Moreover, the government argues that if established property rights are recognized, the administration of the Act would be "complicated" and that, in effect, difficult legal questions will arise."

We have demonstrated in this brief that in fact no such complications arise; but we submit that it is a novel introduction into the great body of jurisprudence of this country to suggest that legal rights of property should be determined the easy way and that administrative bodies and courts should be relieved from the burden of solving difficult legal questions. Even if it would be simpler for the Veterans Administration to follow a "consistent" course in the administration of the 1940 Act, if such consistency amounts to dogmatism and is justified by pragmatism rather than by legal principles, it becomes that "foolish consistency" which is "the hobgoblin of little minds, adored by little statesmen, and philosophers and divines."

Great emphasis has been placed on the "soldier-

[33]Id., p. 32-35.

insurance" situation,[34] but it is submitted that the decisions which have held that "'the only relations of the contract [are] between the government' and the insured service man,"[35] should not be construed as requiring the result reached in this case. Many of the policies heretofore issued have been converted. Many "soldiers" (a vast majority) to whom they were issued are no longer in the active service of their country. In these cases, most of the premiums are now being paid from civilian earnings, not from service pay; and there is no question that these earnings are community property in Texas.

We cannot conceive that the *"government-serviceman" relationship* is bettered in either war or peace by a policy which disregards the *"serviceman-family" relationship* as controlled and regulated by state law. Yet the arguments made for appellants in this case must all, in the final analysis, rest on an implied congressional intent to effectuate a policy that would permit the fraudulent destruction of family property rights secured by state laws. These laws and the property rights conferred thereunder were formulated for the purpose of preserving and protecting the family relationship and were passed in recognition of the fact that the strength of the State lies in the strength of the family unit. In war, if the morale of the family fails, the morale of the soldier suffers, and the existence of the nation is imperiled. In peace, if the sanctity and stability of the home is weakened, the strength of the nation is sapped.

Now that the exigencies of the war have passed, many former service men and women engaged in the

[34]Id., p. 42.

[35]Id., p. 42.

peaceful pursuits of life and planning for their future security have and will take advantage of the opportunity afforded by law to convert their government insurance policies. The policies so converted will frequently constitute the only item of family savings. We have previously enumerated the various situations in which the Texas law recognizes the respective property rights of husband and wife in a policy of insurance on the life of either spouse when the premiums are paid from community funds. We strongly urge that this Court reconsider its decision which does violence to these rights. We believe that upon reconsideration it will find that there is no basis for inferring a congressional intent to destroy property rights established by State law; that there is therefore no conflict between the Federal Statutes and State community property laws; and that it may consistently effectuate the intent of Congress and preserve to husband and wife their respective property rights under State law. This court has effectively protected these rights in the past. It can and should protect them in this case.

For all the foregoing reasons we respectfully submit that the Appellee's Petition for Rehearing should be granted.

PRICE DANIEL
Attorney General of Texas

CHAS. D. MATHEWS
Executive Assistant Attorney General

MARIETTA MCGREGOR CREEL
Assistant Attorney General

HARVEY L. DAVIS
Associate Professor of Law
Southern Methodist University
Of Counsel

March, 1950

APPENDIX

Texas Statutes Involved

Article 2571, Vernon's Texas Civil Statutes.

Where any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows:

1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.

2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased have neither surviving father nor mother nor surviving brothers and sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.

Article 2578, Vernon's Texas Civil Statutes.

Upon the dissolution of the marriage relation by death, all property belonging to the commu-

nity estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, the the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

Article 4619, Vernon's Texas Civil Statutes.

Sec. 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve-month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

Article 4638, Vernon's Texas Civil Statutes.

The court pronouncing a decree of divorce shall

also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

Article 4736a, Vernon's Texas Civil Statutes.

Sec. 1. Whenever any person shall procure the issuance of a policy of insurance on his or her life in any legal reserve life insurance company, and designate in writing filed with the company the beneficiary to receive the proceeds thereof, the company issuing such policy shall, in the absence of the receipt by it of notice of an adverse claim to the proceeds of the policy from one having a bona fide legal claim to such proceeds or a part thereof, pay such proceeds becoming due on the death of the insured to the person so designated as beneficiary, and such payment so made, in the absence of such notice received by the insurance company prior to the date of the payment of the proceeds, shall discharge the company from any liability under the policy.

Sec. 2. The provisions of this Act shall apply to all policies now in existence as well as to all policies hereafter written.

Texas Constitutional Provisions Involved

Texas Constitution of 1845, Article VII, Section 19:

All property both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights

of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property. [Const. 1845, Art. VII, Sec. 19; Const. 1866, Art. VII, Sec. 19; Const. 1869, Art. XII, Sec. 14.]

Texas Constitution, Article XVI, Section 15:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to

the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed. Sec. 15, Art. 16, adopted Nov. 2, 1948.

SUPREME COURT, U.S.
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MAR 22 1950
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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 119

LOUISE M. WISSNER, and
LEANDOUS H. WISSNER,
Appellants,

v.

MARGARET WISSNER,
Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEALS,
STATE OF CALIFORNIA,
THIRD APPELLATE DISTRICT.

MEMORANDUM OF THE STATE OF ARIZONA, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE'S PETITION FOR A REHEARING.

FRED O. WILSON,
Attorney General of Arizona,

CALVIN H. UDALL,
Assistant Attorney General of Arizona,
108 Capitol Building,
Phoenix, Arizona,

Attorneys for the State of Arizona, Amicus Curiae.

March , 1950.

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MEMORANDUM OF THE STATE OF ARIZONA, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE'S PETITION FOR A REHEARING.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the State of Arizona, *Amicus Curiae*, by and through its Attorney General, and respectfully presents this memorandum in support of appellee's petition for a rehearing, and for its memorandum respectfully shows:

PRELIMINARY STATEMENT:

The State of Arizona has an urgent concern in the decision in this case by reason of the fact that thous-

ands of its war veterans hold policies of National Service Life Insurance and have paid and are paying the premiums thereon with community funds, one-half of which is owned by their spouses. We ask that this case be reconsidered, and we believe that the following matters particularly merit the attention of this Honorable Court:

ARGUMENT:

The majority opinion holds that the appellee, Margaret Wissner, cannot have a "vested right" to the insurance money in question because of the provisions of 38 U.S.C., Section 802 (i). Considering the words used in this subsection in addition to "no person shall have a vested right", and further considering the context as a whole, and the title of the paragraph from which the language used in the majority opinion was taken, we suggest that Congress did not intend, when it enacted this provision, that it apply as the court has here applied it, and we further suggest that by no reasonable construction can the same be so applied.

The title of this subparagraph reads:

"Payment of Benefits Where Beneficiary Undesignated or Dead."

The first sentence contained in this subsection deals with the manner of payment in the event no beneficiary is designated, or in the event the beneficiary has pre-deceased the insured. This sentence just referred to clearly could not apply to this case. Next it

is provided that the payments are conditioned upon a beneficiary being alive to take the same. The remaining part of this subsection reads as follows:

> " * * * *No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h).*"

It seems apparent from a reading of this quoted portion that when the Congress used the words "no person shall have a vested right" it meant them in the sense that the right to the installments of insurance was not descendible or devisable to the heirs of the beneficiary, as is ordinary property in which a person has a vested right. 38 U.S.C. 802 (j) restates the same proposition in express terms.

It appears to us that when Congress enacted the words "no person shall have a vested right to any installment or installments of any such insurance," it used the words "vested right" in their ordinary legal sense and that its intendment was that the rights to the installments were to remain contingent or conditional. Under general insurance law, when the insured dies the beneficiary he has designated acquires a vested right to the proceeds of the policy.

> *Penn Mutual Life Insurance Co., v. Slade*
> 47 Fed. Supp., 219, at page 222.

Webster v. State Mutual Life Assurance Co., of Worcester, Mass., 50 Fed. Supp. 11, at page 18.

We believe that in choosing these words Congress intended merely to make an exception in the general law relating to vested rights in beneficiaries of insuring contracts.

The very nature of a vested right entails the incidents of assignability, descendibility and devisability, and Congress did not want these incidents to inure to the beneficiary, so it then, in the next following subsection (802 (j)), provided that no benefits shall be paid to an heir or personal representative of a beneficiary, and further, that if no person in the permitted class (802 (h)) survives to take the benefits, then no installments shall be paid. We read this as meaning that if an insured dies having designated as beneficiary a person or persons referred to in 802 (h), and if the designated beneficiary and none of the other persons therein referred to survive the insured, then the government would pay absolutely nothing under the policy. This is a salutary rule since the purpose of National Service Life Insurance is to protect financially the dependents of service personnel.

However, we cannot perceive how sections 802 (h), (i) and (j), or the words "no person shall have a vested right", which were taken from context, can apply to the appellee. The facts clearly indicate that the appellee is not claiming as a beneficiary, and that

she is not asserting any right against the government, as was attempted in the case of *Pack v. United States*, 176 Fed. 2d 770. That case was one with a fact situation comparable to the case at bar, except that there the wife sued the United States directly. The court after holding that she could not bring an action against the government, stated, at page 772:

> *" * * * The wife, in order to have the community property right adjudicated, is required to resort to an independent action because litigation of the community property rights of the wife and mother is not a determination of a claim against the United States."*

To us it would seem that the Federal court has indicated that an action like the one brought in this case is proper in such cases.

We earnestly submit that the provision quoted in the majority opinion relating to vested rights certainly cannot be deemed to be declarative of the appellee's rights in the money which was used to pay the premiums for the insurance, and that these property rights are to be determined by state law. If section 802 (i) were held not to apply to the appellee, then we feel that a serious constitutional question would be present, because it is urged by the dissenting opinion and conceded by the majority opinion that under California law a wife, whose husband has used community money to purchase insurance and has named

some third person as beneficiary, may proceed against said third person and recover judgment against him in an amount equal to one-half of the proceeds of the policy. The majority opinion, of course, makes an exception in the case of National Service Life Insurance.

We urge the court that the dissenting opinion has properly stated that one-half of the fund which the government is paying to the appellants is merely the measure of recovery and this would seem clearly correct when it is remembered that the appellants, the named beneficiaries, do not have a vested right to the installments. 38 U.S.C. 802 (i).

CONCLUSION:

We believe that the provision against a "vested right" contained in 38 U.S.C. 802 (i) only applies to beneficiaries and cannot be construed to apply to appellee, for the reason that she is not pretending to claim as a beneficiary but is rather asserting her right as the owner of one-half of the money used to pay for this insurance, and is attempting to obtain the fruits of that money in a personal action against the appellants. If this provision does not apply to appellee, then her right to proceed against the appellants personally (not against the installments themselves) must be recognized. If this right is not recognized, then we believe that she would be deprived of property without due process of law in contravention of the Fifth Amendment to the United States Constitution.

Because of the importance and far-reaching effect of this decision, we respectfully urge the court that a rehearing be granted in this case.

Respectfully submitted,

FRED O. WILSON,
Attorney General of Arizona,

CALVIN H. UDALL,
Assistant Attorney General

Attorneys for the State of Arizona,
Amicus Curiae.

SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

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vs.

MARGARET WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

HEARING DENIED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEE'S PETITION FOR REHEARING AFTER DECISION BY THE SUPREME COURT OF THE UNITED STATES.

CLEARY AND ZEFF,
E. DEAN PRICE,
By LESLIE A. CLEARY,
Cleary-Zeff Building, 1209 H Street, Modesto, California,
Counsel for Appellee and Petitioner.

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SUPREME COURT OF THE UNITED STATES

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HEARING DENIED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEE'S PETITION FOR REHEARING AFTER DECISION BY THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the plaintiff and appellee and respectfully petitions this Court for a rehearing in the above entitled

cause on the grounds and for the reasons hereinafter set forth.

Introduction

If this matter involved only the destruction of the property rights of the appellee, we of course would not ask for a rehearing in this matter as the expense and burden of the litigation even up to the present time could not be justified by the amount involved in dollars and cents.

Since the decision of the Supreme Court in this case destroys, both now and for years to come, the rights of many women in the twelve community property states and Hawaii and badly confuses the law to be applied by the courts in the community property states where veterans insurance is under consideration, we feel that we are obligated to ask the court to reconsider this matter and to grant a rehearing for that purpose.

I may say at the outset that it is never a pleasant task to ask for a rehearing from any court as it is certain to necessitate criticism of the opinion rendered. Because of my belief that the Supreme Court of the United States is the greatest court in the world and because of my profound respect for the men who sit on that Court, this task is particularly unpleasant to me.

Although I endeavored to present this matter to the Court with all the ability I have, it becomes obvious from the majority opinion that I lacked the talent or ability to present the situation as clearly or intelligently as it should have been presented. Undoubtedly one of the weaknesses of the presentation that I made was my complete failure to recognize the fact that the members of the Court are quite unfamiliar, generally speaking, with the provisions, purposes, and concepts of community property laws even though they are in effect in twelve states and in Hawaii.

Points and Argument

I. *Provisions of California Community Property Law Affected by This Decision Require Determination of Character of Property, i.e., Whether Community or Separate.*

(a) Definition of community property.

The method pursued by California in defining community property is what might be regarded as a reverse approach. Separate property of the wife is defined in Section 162 of the Civil Code of California as:

> "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."

Separate property of the husband is defined in Section 163 of the Civil Code as:

> "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."

Community property is thereupon defined in Section 164 of the same Code as:

> "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State is community property. . . ."

It thus becomes apparent that under the California definition of community property the earnings of either hus-

band or wife during marriage and the accumulations or result of the investment of such earnings is community property.

(b) Relationship of husband and wife as to management and operation of community property.

Section 172 of the Civil Code of California provides:

> "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration. . . ."

The provisions with reference to the management of *real property* are not involved in this case and hence will not be quoted although we may say this matter is covered by Section 172a of the Civil Code of California.

(c) Community property provisions take the place of courtesy and dower.

California Civil Code, Section 173, provides:

> "No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband."

This section we believe is significant for the reason that it emphasizes the fact that the community property laws are intended to provide for the wife the same type of security for support and care upon her husband's death as is granted by dower or similar statutes in other states. This fact makes it even more difficult to distinguish this case from the cases involving alimony and support.

(d) *Entire basis of state law for determining wife's rights in case of divorce requires definite determination as to whether property is separate or community.*

Section 141 of the Civil Code of California provides as follows:

> "In executing the five preceding sections the court *must* resort (1) *to the community property* then (2) to the separate property of the husband". (Emphasis ours.).

The five sections referred to in Section 141 just mentioned are as follows:

California Civil Code, Section 137:

> "When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action. When the husband or wife wilfully deserts the wife or husband, as the case may be, or when the husband or wife has any cause of action for divorce as provided in Section 92 of this Code, he or she may, without applying for divorce, maintain in the superior court an action against her or him for permanent support and maintenance of himself or herself or of himself and children, or of herself and children. When the husband wilfully fails to provide for the wife, she may, without applying for divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. When a father wilfully fails to provide for his children, the mother of the children may, without applying for a divorce or maintenance for herself, maintain in the superior court an action against him solely for the support and maintenance of the children. During the

pendency of any such action the court may, in its discretion, require the husband or wife, as the case may be, to pay alimony or as costs of action or as attorney's fees any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The court, in granting the husband or wife permanent support and maintenance of himself or herself or of himself and children or herself and children, in any such action, shall make the same disposition of the *community property* and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction. (This refers to provisions of Section 146 of the same Code hereafter quoted.) The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court." (Emphasis ours.)

California Civil Code, Section 137.5:

"In all actions for divorce or annulment or separate maintenance in which the court grants to the wife or husband, as the case may be, attorney's fees in the prosecution or defense of the action, as the case may be, such fees may, in the discretion of the court, be made payable, in whole or in part, to the attorney entitled thereto, and judgment may be entered and execution levied accordingly."

California Civil Code, Section 138:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. . . ."

California Civil Code, Section 139:

> "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects. . . ."

California Civil Code, Section 140:

> "The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

It appears to us that these sections alone make clear the fact that the essence of community property is a means of securing support and care for the children, the wife, and the husband and it is of course obvious that a court must know the character of the property in the possession of the spouse—that is, whether it is community or separate, in order to carry out the above provisions of California law.

These are not the only provisions of California law making it essential that the character of the property of the spouse—that is, community or separate, be determined. Section 142 of the Civil Code provides in part as follows:

> "When the prevailing party in the action has either a separate estate, or is earning his or her own livelihood, or there is community property sufficient to give him or her alimony or a proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court in its discretion, may withhold any allowance to the prevail-

ing party out of the separate property of the other party. . . ."

Section 146 of the California Civil Code sets up the rules for determining the disposition of community property upon the granting of a divorce. The first two subsections under Section 146 are the only ones particularly in point. They read as follows:

"One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the *community property shall* be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." (Emphasis ours.)

"Two. If the decree be rendered on any other ground than that of adultery, incurable insanity, or extreme cruelty, the *community property shall* be equally divided between the parties." (Emphasis ours.)

Section 147, California Civil Code:

"The court, in rendering a decree of divorce, *must make such order for the disposition of the community property,* and of the homestead, as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds." (Emphasis ours).

(e) *The determination by the court of the character of the property of a deceased husband, i. e. whether community or separate, is a basic necessity under the California Probate Code.*

The following sections of the Probate Code of California make this clear.

Section 201: "Succession. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse, the other half is sub-

ject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of Sections 202 and 203 of the Code."

Section 201.5: "Personal Property. Upon the death of either husband or wife, one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code."

Section 202. "Subject to debts, etc.: Death of Wife. Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; . . ."

Section 203. "Husband's Power Over Community Realty: Notice of Claim of Interest. After 40 days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property. . . ."

Other provisions of the California Probate Code provide for the succession to *separate* property and these provisions also require the court to determine what is separate and what is community.

As the Court will note, all these provisions, whether related to divorce or death, apply with equal force to the husband and wife. Naturally it is entirely possible that the determination of the character of veterans insurance—that is, whether community or separate, is not confined to

cases where the insured is the husband as many women members of the armed forces also carry such policies and we may well have a situation where a woman who is a former member of the armed forces carries an insurance policy on her life on which all of the premiums are paid out of community accumulations consisting entirely of the husband's earnings. It is apparent that the Court's decision in this case would likewise deprive such a husband of any interest in the proceeds of the policy if the wife chose to defraud him by giving away the community property.

While there are many other provisions of California law[1] making it essential for the owners of property and the courts of this state to know whether property of the spouse is community or separate, we believe the quoted code sections amply demonstrate this fact.

II. *The Court's Opinion in This Case Leaves in Doubt the Question of Whether or Not Veterans Insurance Policies and Their Proceeds Are Community Property or Separate Property.*

We present this discussion because, even though the Court adheres to a decision against our contention on the issues involved in this matter, *it is essential for the purpose of avoiding confusion in the laws of community property states that the Supreme Court clearly decide either that a National Service Life Insurance Policy and its proceeds are community property or that they are separate property.*

A careful and repeated analysis and study of the opinion leads us to the conclusion that it cannot be determined with any reasonable assurance whether the Supreme Court intends to hold (a) that the Veterans insurance policy and its proceeds are separate property and therefore the wife

[1] Undoubtedly the community property laws of the eleven other community property states and Hawaii contain similar provisions.

has no interest therein or (b) that the Veterans insurance policy and its proceeds are community property but Congress immunized the policy and the proceeds against any claims of the wife.

On page 2 of the opinion the Court assumes (and it is of course admitted by the pleadings) that the pay of a soldier is community property. On the same page the Court states that "Major Wissner's army pay . . . was the source of the premiums paid on the policy."[2]

In other words, it is conceded by the Supreme Court and everyone else that the soldier, without the consent or knowledge of the wife, purchased a contract from the federal government with community funds. The Court does not, and we believe cannot, deny that the wife's half interest in the earnings was vested.

On page 2 of the opinion, the Court continues as follows:

> ". . . the Court (California) concluded that the proceeds 'were and are the community property' of the widow and the decedent and entered judgment for appellee for one-half the amount of payments already received plus interest and required appellants to pay appellee one-half of all future payments 'immediately upon the receipt thereof' by appellants or either thereof. The District Court of Appeal affirmed (89 Cal. App. 2d 209, etc., Pacific 2nd 1949) holding that appellee had a 'vested right' to the insurance proceeds and the Supreme Court of California denied a hearing, one Judge dissenting."

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[2] Some lose statements may appear in the briefs on both sides to the effect that premiums were paid from army pay but the record before this Court contains no such statement. Our complaint alleged that "the premiums on said insurance policy above referred to and the whole thereof were paid from the earnings of the said Leonard O. Wissner" (Tr. 3). The defendants' answer alleged that the premiums were paid by deductions from the pay of Wissner as an officer in the army (Tr. 8). The lower Court found in exact accordance with the allegation of our complaint (Tr. 13).

The opinion of this Court then says:

> "We are of the opinion that the decision below was incorrect."

It cannot be ascertained from this statement in what particular the judgment of the lower court is incorrect. We contend that if the Supreme Court intended to say that the policy and its proceeds are not community property, it is essential, to avoid confusion, that this be said simply and clearly.

Following the last quoted excerpt from the opinion is a discussion of the fact that the National Service Life Insurance Act is a system of insurance for members and veterans in the armed forces; that premiums are low; that under certain conditions they are waived; that costs of administration are borne by the United States, and the liability may be discharged out of Congressional appropriations.

So far as we can understand the basic problem here under discussion, none of these considerations are relevant. None of them affect the character of the property (insurance contract) purchased by the serviceman, i. e. as to whether it is community or separate, and certainly none of them deprive the wife of her rights. *Lynch* v. *U. S.*, 292 U. S. 571, holding the contract is property and gives rise to vested rights.

The opinion points out that the soldier has the right to designate the beneficiary or beneficiaries of the insurance and the right to change such beneficiary. From this clause of the Act, and apparently from no other, the opinion of this Court concludes "thus Congress has spoken with *force* and *clarity* in directing that the proceeds *belong to the named beneficiary and no other*. (Emphasis ours.)

We do not find either in the beneficiary clause of the Act or elsewhere any enunciation by Congress that the pro-

ceeds of insurance "*belong to the named beneficiary and no other*". We suggest that this statement is incorrect under existing decisions that were not questioned by this Court. For example, it has repeatedly been held in the federal courts that even though the serviceman names a woman whom he believes to be his wife as beneficiary, the determination of whether or not she is his wife must be left to the law of the state of marriage. *Brown* v. *U. S.*, 164 Fed. (2d) 490; *U. S.* v. *Laton*, 68 Fed. Supp. 247; and *U. S.* v. *Robinson*, 40 Fed. (2d) 14.

Again, there are many cases holding that when the beneficiary has received the proceeds and invested them, they lose all protection and can be taken under any appropriate claim.

If it can reasonably be said that the enunciation of Congress that the soldier has the right to *designate the beneficiary* and to *change the beneficiary* is speaking with *clarity* and *force* to the effect that the wife's community property rights are destroyed or to the effect that the proceeds belong to the named beneficiary and no other, we suggest that it is unusual that three Justices of the Appellate Court of California, 6 Justices of the Supreme Court of California, and three Justices of the Supreme Court of the United States were unable to so understand the Congressional language. With all due respect to this Court, it occurs to us that with twelve Justices of various Appellate Courts taking one view of the Congressional language and five taking another view, it is not inappropriate to conclude that the phraseology of Congress is hazy and uncertain rather than clear and forceful.[3]

We suggest to this Court the language of Mr. Justice McReynolds in *Carrier* v. *Bryant*, 306 U. S. 545, 83 L. Ed.

[3] We, of course, have at all times contended that the phrase is clear and forceful until Courts seek to find a hidden meaning beyond that of the words used.

976, where he was considering Section 454a of the Act in question in this case. "We find nothing in the history or supposed purpose of the enactment adequate to support a construction not in accord with the *ordinary import* of the words employed". (Emphasis ours.)

It is a very common thing for insurance policies to provide that the insured shall have the right to designate and to change beneficiaries. (A contract of this character was before the California Supreme Court in *Grimm* v. *Grimm*, 26 Cal. (2d) 173, 157 Pac. (2d) 841.)

We submit that this phrase, or one substantially the same, is in common usage in hundreds of thousands of insurance contracts. The United States simply adopted a phrase that was not at all new to the insurance business. The designating of a beneficiary under the common meaning of the words only means that the proceeds are to be paid to that person. The company, or in this case the United States, in issuing the insurance does not contract to do anything else. The Court's opinion must necessarily add to the ordinary and common import of the phrase additional words in substance as follows: "and once the proceeds are paid to the beneficiary they shall belong to that beneficiary (whether the insured or a stranger to the community) and to no other and shall be untouchable in any manner by the wife or widow of the insured". We humbly suggest that the addition of such a sweeping clause is a job for Congress rather than for the Court.

The Court then observes that the mother was the beneficiary Congress directed *shall receive* the insurance money. This statement is in accord with our theory. Both the soldier and Congress directed that the mother should *receive* the insurance money. By naming a beneficiary under a contract that permits him to name a beneficiary, the soldier fully uses the right he has under the policy and

is assured that the mother will receive the insurance money from the United States.

The next statement in the opinion inadvertently assumes a contention on our part that we did not make. At no time did we purport to discover "Congressional purpose that widows in community property states participate in the payments". *The only thing we purported to discover and the only thing we believe can be discovered in the Act is that Congress did not show any purpose to change existing law on that subject. In other words, the Act is silent on this point and therefore does not cut off the widow's rights.*

There is no other portion of the opinion coming close to a determination of the question of whether or not the soldier's insurance policy is community or separate property other than the next to the last two sentences appearing on page five as follows:

> "The federal statute establishes the fund in issue, and forestalls the existence of any 'vested' right in the proceeds of federal insurance. Hence no constitutional question is presented. However 'vested' her right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance."

It seems to us that the first sentence which we have quoted is not exactly in accord with the facts. In reality, Congress passed a law which *permitted the establishment of the fund in question through the collection of premiums from soldiers* with the government paying administration expenses. As to whether or not Congress forestalled the existence of any vested right in the proceeds of federal insurance, we can only say that this Court has determined in *Lynch* v. *U. S.*, 292 U. S. 571 (the case being cited in this opinion) that Congress did not forestall the existence of any vested right in the contract with the government or in the proceeds

of federal insurance. Here Mr. Justice Brandeis said in specific and concise words "*the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents. . . . War risk policies being contracts are property and create vested rights.*" (Emphasis ours.)

The holding of *Lynch* v. *U. S., supra,* establishes the fact that the insured and the beneficiary, who may be himself, have vested rights which cannot be destroyed by Congressional Act. This case is cited with approval in *U. S.* v. *Zazove,* 334 U. S. 602, 92 L. Ed. 1601, where in a unanimous opinion considering the interpretation of Section 602-h of the National Service Life Insurance Act of 1940, at page 611 of U. S. or 1607 of L. Ed., footnote 12, it is said:

> "*This is not, of course, to deny that the statute and regulations adopted pursuant to it give rise to an obligation that has the force of a binding contract with the serviceman insured*", *citing Lynch* v. *U. S., supra, as authority.* (Emphasis ours.)

The Court in the opinion in the present case concludes that because "the federal statute . . . forestalls the existence of any 'vested' right in the proceeds of federal insurance", California courts have no control over the property rights of their citizens where those rights involve a National Service Life Insurance policy or its proceeds.

In view of the holding in *Lynch* v. *U. S.*, and the statement made in the *Zazove* case just referred to, we respectfully suggest that since the husband, upon purchasing the insurance policy from the United States with funds belonging equally to himself and wife, acquires a vested right to the benefits contracted for in the policy, namely, disability payments if he is disabled or the proceeds if he names himself as beneficiary; it seems to require at least a modicum

of legal legerdemain to establish that the wife whose money is used by the husband does not likewise acquire a vested right.

As we indicated in the beginning of this portion of our discussion, it is our earnest conclusion that the opinion of the Supreme Court in this case leaves uncertain the question of whether or not veterans insurance policies or their proceeds are community property or separate property. The essence of the decision of the Court is that the wife is deprived of any right to claim her half of the policy or its proceeds under any circumstances because, according to the opinion, "Congress has provided . . . that the chosen beneficiary of the life insurance policy shall be during life the sole owner of the proceeds".

This conclusion can be equally well arrived at either by saying that Congress intended that the policy and its proceeds shall not be community property but shall be separate property or by saying that even though the policy and its proceeds are community property Congress intended to deprive the wife of the right to obtain her portion thereof. Naturally we do not agree with either interpretation of the Act. We are merely saying that either one of the approaches mentioned would fit in with the opinion of this Court.

III. *Failure to Determine Community or Separate Character of Policy and Proceeds Leaves State Law in Confusion.*

As we have already indicated, the determination of the character of the property is of paramount importance to community property states. We respectfully urge that those states are entitled to an opinion in this case that *clearly* and *unequivocally* says in *plain language* whether or not the Supreme Court of the United States regards a veterans

policy purchased with community funds, (whether they be soldier's earnings, wife's earnings, or proceeds from community investments) as community property or separate property.

In determining this question it is essential to keep in mind the fact that this opinion is laying down a broad rule and should not under any circumstances contemplate only the policy purchased during war time, paid for out of soldier's pay and matured by virtue of the soldier's death during the war. The opinion as now written covers every veteran's insurance policy, including the many that have been in force since World War I.

It is our belief that *many policies from World War I have been converted* and that at this time *many of them have a high cash value or will soon fall due as endowments.* We also believe that *as to many of these policies 30 or more annual premiums have been paid out of community funds, including the earnings of the husband and the wife and the proceeds of their investments, as against only two or three annual payments that may have been made out of the earnings of the husband during actual war time.*

As Mr. Justice Brandeis said in Lynch vs. U. S., "these insurance policies, being contracts, are property and create vested rights".

Since the soldier's contract is property, the courts of California and the courts of all the other community property states will constantly be confronted with the determination of the character of that property, whether community or separate, in order to put into effect the laws providing for the division of property between men and their wives in divorce actions, the use of the property of the spouse for support and maintenance, the property that may be resorted to for the payment of separate and community debts, the right to succession, and many other problems that are so

integrated with the laws of community property states it is impossible to segregate them.

For example, a soldier in World War I converted his insurance, named himself beneficiary, and now elects to collect the cash value, which may be several thousand dollars, and may be the only property of the community. He holds the money in the bank and does not invest it. If the opinion in this case as now written stands, the Courts in California must be controlled by it in determining whether or not this fund created by the investment of the soldier under the Congressional Act here in question is community property or separate property.[4] Until that question is decided and determined, the hands of the state courts will be tied and no effective disposition can be made of the property.

IV. *Logical Analysis Shows That None of the Provisions of the Act Relied on Support the Majority Opinion of the Court.*

As nearly as we can understand the Court's opinion, three provisions of the Act in question are relied on for support, namely, the provision giving the right of naming or changing beneficiary, the provision providing that no person shall have a vested right, and the provisions of Section 454a relative to exemption from claims of creditors.

(a) *Right to Name and Change Beneficiary.*

The language of the Act in this regard, as hereinabove pointed out, is quite simple and would seem to be reasonably easy to interpret without adding any ruffles or frills to it. The contract merely says that the soldier "shall have the right to designate the beneficiary or beneficiaries of the

[4] The opinion as now written says the wife cannot obtain either her share of the identified fund or an equivalent amount (Opinion pages 3-4).

insurance . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries." Since we have referred to this provision in the last section of our argument, we do not intend to discuss it in detail again except to say that the right to name or change beneficiary has a very common, ordinary, and well understood meaning and that if the ordinary meaning of these words is to be enlarged to mean, as the Court says, that "the proceeds belong to the named beneficiary and no other", it obviously adds to and changes the meaning of the simple words used by Congress. How this plain unambiguous and unequivocal language can be used to destroy rights that would otherwise be recognized is not understandable to us.

(b) *No Person Shall Have a Vested Right.*

We have likewise referred to this phrase of the Act in previous portions of this petition for a rehearing but we repeat that since the Supreme Court, *Lynch* v. *U. S.*, *supra* and *Zazove* v. *U. S.*, *supra*, has recognized that a soldier either as beneficiary, if he names himself, or as the insured, if he is entitled to disability, has a vested right we cannot understand how the Supreme Court can rely on this clause to support the conclusion that the soldier's wife, whose interest in community investments under the state law is equal with the husband, has no vested right.

(c) *Proceeds Exempt From Claims of Creditors, Attachment, Levy, and Seizure.*

The Court tacitly admits that the portion of the judgment providing for a money judgment against the defendants for $882.05 plus interest is not an attachment, levy, or seizure of any part of the proceeds of the insurance. It is naturally quite obvious that this must be the conclu-

sion as this case up to the present time does not involve any attachment, levy, or seizure of any kind. That portion of the judgment covering moneys due up to the date thereof may well be satisfied out of other properties of the defendants including investments that have no relation whatever to the proceeds of the insurance. This being the situation, we fail to see how any support for the Court's opinion can be gleaned from the exemption provision so far as the portion of the judgment up to date of entry thereof is concerned. As to the remainder of the judgment, the measure of the amount awarded is an amount equal to half of the payments received by the beneficiary as pointed out by Mr. Justice Minton in the dissenting opinion. It is true that the judgment requires the defendants to pay over half of the proceeds as received. This still is not an attachment, levy, or seizure of the proceeds. If the defendants fail to live up to the judgment the normal procedure would be to obtain an execution which would be levied on any property of the defendants. If the execution was levied on their ranches or other accumulations having no relation to the proceeds of the insurance, no question involving the exemption provision would ever arise *unless it is intended by this Court in the present opinion to place a wife in a worse position than a creditor.*

Again, as we have previously pointed out, the appellants in this matter relied solely on the provisions of Section 454a, 38 USC, claiming that this section prevented the taking of the proceeds of insurance by any form of court action. This argument, it seems to us, is completely overcome by the fact that the cases which this court cites and recognizes on page 4 of its opinion have long established the rule that the proceeds of insurance are subject to court process and to levy and seizure for alimony and support of the wife and children.

The opinion of this Court obviously reflects the great difficulty of drawing any distinction between the cases with reference to alimony and support for the wife and the instant case so far as the exemption provision is concerned. *We believe that, in view of the sections of the California Civil Code which we have heretofore cited in this petition for rehearing, it will become apparent that the community property interest of the wife is created for the same purpose and is utilized in divorce and separation for protection of the wife's interest in the accumulated property and for her support and maintenance in the same manner as accumulated marital property is used under provisions of statutes of other states providing for alimony, support, and maintenance, and division of the accumulated marital property in the event of divorce and dower.*

The Solicitor General in his brief contended that the alimony cases could be distinguished because there was no element of need or destitution shown by us on the part of the appellee. We note that the Court's opinion disposes of that contention and recognizes the fact that there is no such distinction between community property interests and other provisions for division of marital property in non-community States.

It does occur to us, however, that the opinion of the Court misses the point for which we cited these cases. To repeat it here, the appellants for support of their position and *the Court for support of its opinion, rely on the exemption provision of Section 454a, which according to the argument of appellants and the decision of the Court,* goes beyond the protection of the proceeds from *claims of creditors and like debts.* We cited alimony cases and similar cases to show that this contention is not sound. The Court's opinion recognizes the cases which hold that the exemption section does not go beyond claims of creditors and other similar debts,

hence it appears to us to be illogical to say, as the opinion of the Court does on page 5, "our view of those cases, whatever it may be, is irrelevant here". If this Court believes those cases are correct in their position that the exemption clause applies to claims of creditors and other similar debts but does not cut off family rights, then it appears to us to be wholly illogical to say that the wife's community property right is eliminated by the exemption provision. No one can or will assert that her claim is a creditor's claim or debt. We believe no one can or will deny that her claim is a marital claim and cannot be distinguished from alimony or support on any logical or reasonable basis.

Incidentally, we here call attention to the statement found in the opinion on page 5 to the following effect: "further, Congress has provided in the National Service Life Insurance Act that the chosen beneficiary of the life insurance policy shall be during life the sole owner of the proceeds". We have been unable to find any such provision in the National Service Life Insurance Act. The nearest approach to this statement is the provision that the beneficiary shall receive the proceeds from the government and that they shall be exempt in the hands of the beneficiary up to a certain limited point. The cases have extended this exemption only to the funds themselves while in the hands of the beneficiary or while on deposit in a bank, hence if the funds are invested in a government bond or a promissory note, the owner can be divested of their ownership by a creditor and, as previously pointed out, the chosen beneficiary of the soldier may never have any right to or ownership in the proceeds because state law must be invoked to determine whether or not that beneficiary falls within the classes of selected beneficiaries. In this situation the courts have no difficulty in recognizing the fact that the soldier's choice will be nullified.

V. *Participation of the Office of the Attorney General of the United States in this Litigation*

Since I received the opinion of the Court in this case and observed that it was written by Mr. Justice Clark, I made some inquiries to determine what occasioned the appearance of the United States against us on the application of the appellants for a hearing in the Supreme Court of California. The Assistant United States Attorney at Sacramento, California, appeared against the widow, Margaret Wissner, and filed an *amicus curiae* brief in support of the application for a hearing by the California Supreme Court after decision by the District Court of Appeal. At the time I was in Washington arguing this case I did not realize that Mr. Justice Clark, as United States Attorney General, through his office in Washington, had ordered the Assistant United States Attorney General to appear against the widow in this particular litigation.

I was certainly remiss in failing to connect the opposition of the United States with Mr. Justice Clark as the former Attorney General. In this regard I can only say that I did not fully understand the procedure and did not at that time have in mind that the office of the United States Attorney General in Washington during the term of Justice Clark directed the appearance against us by its representatives in California. I am very sure this situation did not occur to Mr. Justice Clark. He undoubtedly had no memory of his office having been on the opposite side of the matter in the California Supreme Court.

It appears, however, that the policy of that office under his direction was to appear and oppose widow's claims in cases of this kind. I now recall that similar opposition by the office of the United States Attorney General occurred in the case of *Nobels* v. *Cannell*, decided October, 1948, in the Los Angeles Superior Court.

I do not wish to be understood as asserting that Justice Clark is or should be disqualified in this matter. Whether such action is required, as I understand it, is within the discretion of the Justice involved and I am frankly of the opinion that I am personally to blame for the situation arising because I neglected to inquire into it at an earlier date.

I do believe, however, that we should recognize the fact that the citizens of this country rightly hold the greatest respect for the Supreme Court of our country and the men who occupy the positions on it. It is important that there never be in the minds of laymen any question of the impartiality of the members of that court. I can most sincerely assure the Court that I would be the last to knowingly permit any situation to arise that would detract from the esteem in which the Court is held by the people. It is of course entirely possible that it would be difficult for a layman to understand that in spite of the circumstances surrounding the appearance of the United States against the widow in the Supreme Court of California and the connection of the office of Mr. Justice Clark therewith, he will be entirely impartial and fair in his consideration of the matter as a Justice of this Court. I regret that such a situation has arisen. I believe, however, that it is my duty to call it to the attention of the Court. What consideration, if any, it deserves is clearly a matter for Justice Clark. He knows the circumstances better than anyone else and I am convinced that his determination as to what, if anything, should be done will be entirely fair.

VI. *If the Provisions of the National Service Life Insurance Act Are to be Made More Drastic, it Would Seem that it Should be Left to Congress.*

It seems to us that the construction placed on the Act in question by the Court's opinion may well be an extension of the provisions of the Act by Judicial decision.

We call attention to the fact that if the Veterans' Bureau believes Congress intended this Act to destroy the community property rights of women in the twelve community property States and Hawaii, it would be comparatively simple for them to submit to Congress an amendment of the Act covering the situation. Amendments to this Act have not been infrequent and since there is such marked disagreement as to its meaning among the many Appellate and Supreme Court Justices who have considered it, there would seem to be no particular reason why the problem should not be placed before Congress in specific terms so that their intent may be expressed.

The subject never has been before Congress so far as we can determine and we think it safe to say that Congress never at any time considered the possibility that the courts might construe the Act as destroying community property rights of women.

We can easily understand that the Veterans' Bureau would not desire to pursue this course because it is almost certain that Congress would never adopt such an amendment. This, however, should not prevent the Court from refusing to extend the provisions of the Act by decision instead of leaving it to the determination of Congress.

VII. *Where Husband Wrongfully Invests Community Property, Widow is Entitled to Proceeds, Not the Amount Invested.*

On page 2 of the opinion we find this comment: "but no claim was made for the premiums. The widow sought the proceeds of the insurance". This statement leads us to believe that we did not make clear to the Court the basic concept or intent of the community property sections of the California Civil Code.

We have quoted these sections in the forepart of this petition for a rehearing but we again call attention to the

fact that community property is defined by defining separate property and then providing that all other property acquired during marriage is community. This clearly includes profits and accumulations on investments hence there is no reasonable basis for a wife to claim the funds invested rather than the proceeds.

The husband, as we have heretofore pointed out by the sections of the California Civil Code, is given the *management of the community personal property.* The relationship thus created, in our opinion, partakes more of the nature of a trust than any other similar legal relationship.

In other words, the husband has the right to hold under this control the wife's share of the community property; he has the right to invest it; he has the right to manage it; but like any trustee he must account to his wife for the results of this management, control, and investment. He cannot give the funds away or dispose of them without consideration. In other words, she presently owns one-half of the property but he is entrusted with the management of it confined however to businesslike handling of her property for the benefit of the community. To admit, as the Court does, that the widow owned one-half of the funds invested but has no right to the proceeds is completely foreign to the concept of community property law in California and we believe is likewise foreign to the intent of Congress in the Veterans Insurance Act.

When a husband gives away the property of the wife he commits a fraud, a violation of his trust as the manager of her property. As Justice Minton well said in the dissenting opinion, "I cannot believe that Congress intended to say to a serviceman 'you may take your wife's property and purchase a policy of insurance payable to your mother and we will see that your defrauded wife gets none of the money.'"

The majority opinion in the case excuses this fraud on the part of the husband and the participation of the United States in it by saying that it is possible that "possession of government insurance payable to the relative of his choice might well directly enhance the morale of the serviceman."

I suppose we might also say that the peace of mind, the enjoyment of life, and therefore the morale of the serviceman, might be enhanced by permitting him to take all of the wife's interest in the community property, or even her separate property, if he knew he had the full protection of the United States government in so doing and could thereby freely take care of a lady friend as he desired. Certainly Congress would never go to such a length. The difference is only one of degree. We doubt that Congress intended to give aid and comfort to any fraudulent activity on the part of the veteran whereby he could deprive his wife of her property. *We again call attention to the fact that in making this statement we have in mind that this opinion involves insurance policies of long standing on which practically all of the premiums have been paid from the ordinary earnings of husband and wife or the profits from community investments, as well as the short-lived policies such as the one here before the Court.*

We feel that the statement appearing in the opinion on page one to the effect that the decedent and appellee were *estranged* at the time he entered the army, or shortly thereafter, is scarcely borne out by the record before this court. The only facts concerning this matter that are in the record are found in the opinion of the District Court of Appeal of California, Third District, and particularly the portions thereof at pages 19-21 of the transcript.

These facts summarized are as follows:

Major Wissner, prior to opening the joint account with his mother, had arranged with the bank to buy bonds for him out of funds which he sent to the bank, which bonds were in his name and the name of one *Naomi Beiler*. These bonds were turned over to his *mother and father*, the appellants, who held them in their safe deposit box and turned them over to the attorney for the estate upon Major Wissner's death.

When he opened the joint account with his parents he told them to retain $250-$500 in reserve and to purchase bonds with the rest in the same manner as he had previously instructed the bank, namely, in his name and in the name of *Naomi Beiler*. The bonds were to be turned over to *the parents* for safekeeping.

The appellee and her husband, Major Wissner, had a joint bank account in which she deposited her earnings, which account he withdrew in its entirety in November, 1944. Major Wissner stopped his wife's allotment in September, 1943; in January of the same year he stated he wished his attorney could get an insurance policy away from plaintiff; in September, 1943, in a letter he mentioned Naomi and stated he wished he could find some way of forcing plaintiff to a settlement and a divorce. In October, 1943, he referred to efforts to get the pink slip to the automobile away from plaintiff and referred to exerting pressure on her. In October, 1943, he stated in a letter that he had stopped the allotment to Margaret to force her to come to terms. He also, in the same letter, stated that the pink slip to the automobile was enclosed and it would be best to have it transferred to his brother so that no one could touch it. The Appellate Court of California, at page 21 of the transcript, said that these moves on the part of the husband in the opinion of the

court were made to force his wife into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded. *Nowhere in the record is there anything to indicate that the wife recognized that they were estranged or that she attempted in any way to deprive her husband of any part of the community property. All of the facts shown in the transcript which I believe we have fairly summarized above, show that the husband was engaged in an effort to defraud his wife of all of the community property that he could possibly get away from her. That his parents were conniving with him and aiding him in turning the community property over to one Naomi Beiler by receiving the bonds made out to her and by receiving community funds to be held by them for the purchase of bonds in the name of Major Wissner and Naomi Beiler. It is of course obvious that the naming of the beneficiary in the insurance policy was for the same purpose, namely, to defraud his wife out of her share of the community property.* Whether he intended the proceeds of this insurance to remain with his mother or whether there was some understanding between himself and his mother and father that this community property was likewise to go to Naomi Beiler, we do not know as there is no evidence on the subject. It is reasonable to suppose, however, that since his parents were willing to assist him in defrauding his wife of other funds so that they might go to Naomi Beiler, they would also aid him in a similar purpose in connection with the insurance.[5]

With these facts in mind it seems to us the opinion, instead of saying that the parties were estranged, could have

[5] This set of facts would, we believe, entitle a wife to the proceeds of the policy even in Texas where the law is much narrower and requires that intent to defraud on part of the husband be shown. The facts in the transcript before this Court certainly would lead to a finding of fraudulent intent on the part of Major Wissner.

more fairly described the situation by saying that "the record showed that Major Wissner was engaged in a plan designed to defraud his wife of her community property and force her into a divorce because of other heart interests", and might well have substituted for the language at the top of page 4 the statement that the judgment below nullified the soldier's effort to defraud his wife and frustrated a deliberate effort to distort a Congressional Act to aid the fraud.

This comment on the opinion may have no particular legal weight as to the proper outcome in this case but we think it does serve to emphasize the fact that the construction placed on the Act by the majority opinion places the United States as represented by Congress in the position of aiding in a deliberate plan of fraud.

VIII. *Supreme Court Recognizes Community Property Rights in Homestead Land*

The opinion of the court cites the case of *Ruddy* v. *Rossi*, 248 U. S. 104, as authority for the statement that "however vested her (widow's) right to the proceeds of nongovernment insurance under California law, that rule cannot apply to this insurance". The case of *Ruddy* v. *Rossi* merely held that Section 4 of the Homestead Act, revised stat. Sec. 2296, comp. stat. 1916, Sec. 4551, providing that "no lands acquired under the provisions of this Act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor" was valid and that the lands could not be subjected to execution as a result of a judgment on a debt contracted prior to the patent even though the patent had issued at the time of suit and judgment. The Court, according to Justice McReynolds who delivered the opinion, regarded the question as involving great difficulties but in any event

the decision in this case had no relation to community property rights of wives.

The Supreme Court of the United States did consider that question in the case of *Buchser* v. *Buchser*, 231 U. S. 157-58, L. Ed. 166. In that case the husband made entry and acquired title to the land involved under the Homestead laws of the United States, the patent being issued December 17, 1903. Thereafter the wife died and the children of the marriage claimed an interest in the land under the community property laws of the State of Washington.

The Supreme Court of the United States held that when title to the property had passed from the United States to the homesteader, the land became subject to the laws of the state.

In so holding, the Court said "*In the present case the acquisition under the United States law is complete and that law has released its control before the state law lays hold and upon grounds in no ways connected or interfering with the policy of Congress, brings the community regime into play. The special family relations thus created are not like contracts with third persons impliedly forbidden by the Act of March 3, 1891, chap. 561, Paragraph 5. . . .*"

The reasoning in that case seems particularly applicable to the instant situation. We could just as well paraphrase the language of the Court in *Buchser* v. *Buchser* to say "in the present case the acquisition (of the proceeds of insurance policy) under the United States law is complete and that law has released its control before the state law lays hold . . . the special family relations thus created are not like contracts with third persons impliedly forbidden by the Act. . . ." This statement is almost in exact accord with our contention, namely that when all acts required by the United States under its agreement with the soldier have been completed, namely, the payment of the proceeds

to the beneficiary, the state law lays hold and further that the special family relations set up by community property law are not like contracts with third persons—that is creditors—and hence are not covered by the Congressional Act.

It was this type of relationship, namely, community property, that was being considered in *Buchser* v. *Buchser* and we think the reasoning of that case could well be applied here.

Conclusion

We earnestly believe that this case deserves further consideration by the Court in order that in its final disposition the opinion of this Court shall be so phrased as to act as an unmistakable and clear guide to the Judges of the community property states in determining the community or separate character of veterans' insurance policies and their proceeds under all circumstances.

We suggest that the tremendous number of policies involved indicates that the opinion should include a careful analysis of the problem as it relates to policies nearing maturity, which have a large cash value built up by long payment of premiums from community funds contributed by both the husband and the wife and accumulated from community investments. There are many such policies now and as the years go by the number and the value will continuously increase. Under the present opinion neither state law nor action on the part of the wife can protect her against future fraudulent acts in connection with this insurance. She must either gamble on her husband's honestly or resort to court action to prevent the payment of premiums from community funds. Neither Congress nor this Court should subject our soldier marriages to the strain of such a situation.

Finally, we urge that the high regard for the marriage relationship and its incidents which has always been one of the fundamental concepts of the American people and their representatives makes it improper to read into this Act a Congressional intent to encourage continued defrauding of wives in connection with millions of outstanding policies. The only facts before this Court show a fraudulent intent on the part of the husband and a carrying out of that fraudulent intent. We cannot believe that Congress intended to foster activities of this character. We believe the people of this country, having before them the facts as they appear in the transcript before this Court, would be affronted by an effort on the part of Congress to condone such actions on the part of the husband.

We respectfully ask that a rehearing of this cause be granted for the reasons herein set forth.

Dated at Modesto, California, February 28, 1950.

Respectfully submitted,

CLEARY AND ZEFF,
E. DEAN PRICE,
By LESLIE A. CLEARY,
Counsel for Appellee, Petitioner herein.